



**VOLUME II**  
**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1965**

**No. 750**

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**BROTHERHOOD OF RAILWAY AND STEAMSHIP  
CLERKS, FREIGHT HANDLERS, EXPRESS AND  
STATION EMPLOYEES, AFL-CIO, ET AL, PETI-  
TIONERS,**

**vs.**

**FLORIDA EAST COAST RAILWAY COMPANY.**

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**No. 782**

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**UNITED STATES, PETITIONER,**

**vs.**

**FLORIDA EAST COAST RAILWAY COMPANY,  
ET AL.**

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**No. 783**

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**FLORIDA EAST COAST RAILWAY COMPANY,  
PETITIONER,**

**vs.**

**UNITED STATES.**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**NO. 750 PETITION FOR CERTIORARI FILED NOVEMBER 18, 1965**

**NO. 782 PETITION FOR CERTIORARI FILED NOVEMBER 29, 1965**

**NO. 783 PETITION FOR CERTIORARI FILED NOVEMBER 29, 1965**

**CERTIORARI GRANTED JANUARY 24, 1966**





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IN THE  
**United States Court of Appeals**

FOR THE FIFTH CIRCUIT

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**No. 22,134**

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FLORIDA EAST COAST RAILWAY COMPANY, *Appellant-Appellee*

v.

UNITED STATES OF AMERICA, *Appellee-Appellant*

(And Reverse Title)

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Appeals from the United States District Court for  
the Middle District of Florida

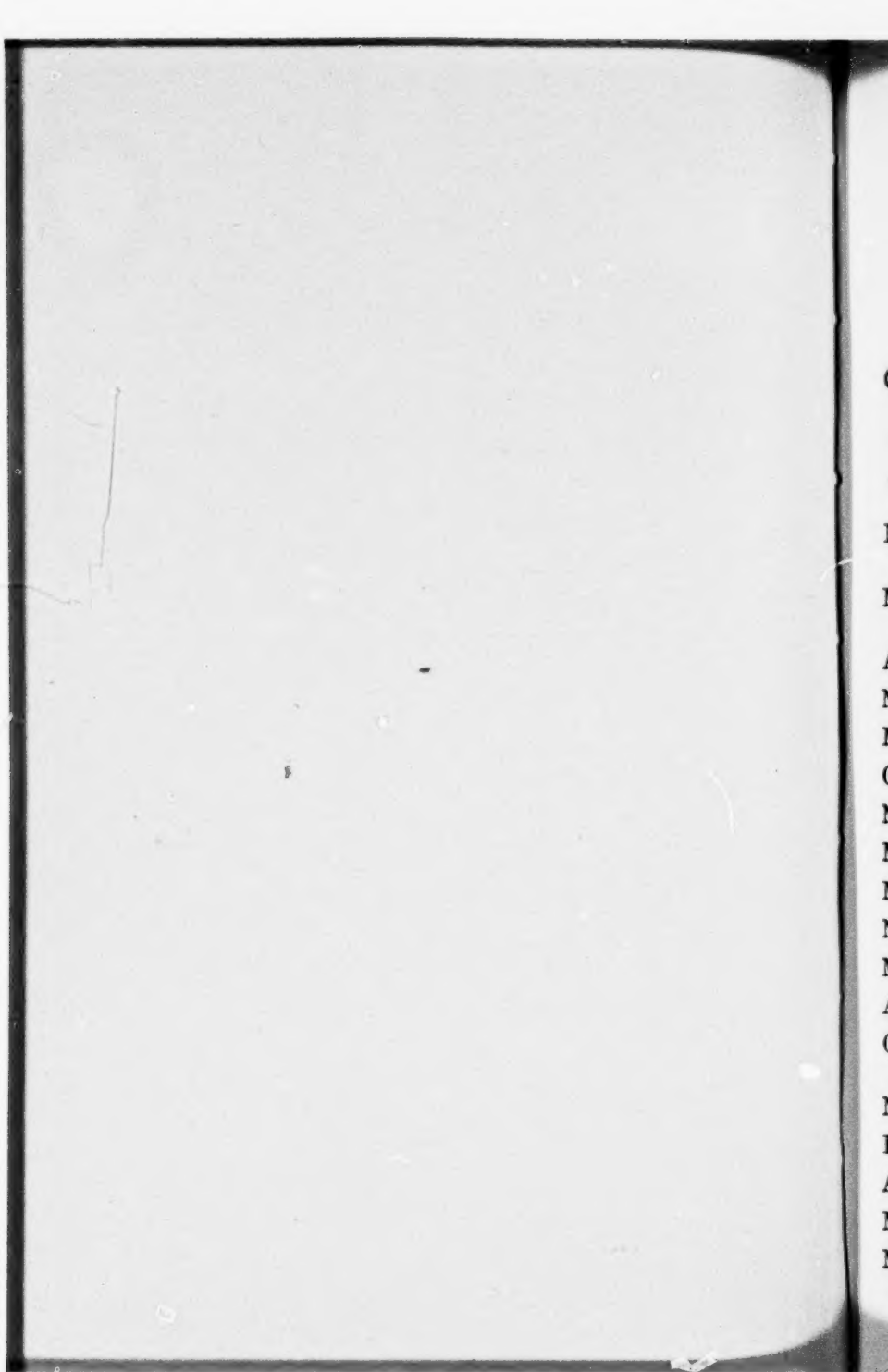
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**Volume II**

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Appeals from the United States District Court for  
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**APPENDIX**

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Mr. Devaney: Mr. Cooke.

**R. M. Cooke.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

**Direct Examination**

By Mr. Devaney:

Q. Will you state for the record your name, please. A. R. M. Cooke.

Q. And you are an official with the Carmen's Union? A. I'm General Chairman, yes, sir.

Q. And these documents that have been marked as Defendants' J and K, those were furnished by you, were they? A. Yes, sir.

Q. Now, have there been any disciplinary actions taken by the Carmen's Union that you are aware of, Mr. 447 Cooke? A. None that have been called to my attention, no, sir.

Q. Now, are these copies extra copies or do you wish them returned to you—the Constitution and the By-Laws? A. I would like to have them returned, yes, sir. They are my office copies.

Q. Mr. Cooke, I hand you this and ask if you are familiar with that letter? A. Yes, sir. This is a letter that I wrote, a copy of it.

Q. A copy of it? A. Yes, sir.

(Mr. Devaney tendering instrument to Mr. Milledge)

Mr. Devaney: Mark that as L, please.

(Thereupon, the referenced document was received and filed in evidence as Defendants' Exhibit L.)

By Mr. Devaney:

Q. Now, this document which has been marked as Defendants' L, Mr. Cooke, is a letter addressed to Mr. Wyck-off. It is dated February 8, and the last paragraph says:

"Please be advised that the employes that I represent have withdrawn from the service of the Florida East Coast Railway Company on a legal strike and that such employes are not subject to call for service."

Now, what was intended by that last sentence of not being subject to call for service? A. Well, simply that several of my members were complaining that the local supervision had called them by telephone and requested that they return to service, and had even intimated in a couple instances that the seniority of the individual would be terminated if they didn't return to service.

Q. Did you later receive a letter from Mr. Wyckoff on this point? A. Yes, sir. I recall that I did.

Q. Is this a copy of the letter that he sent you? (Indicating) A. Yes, sir, I believe that's the letter.

Q. Now, once—I mean, he made it very plain, did he not, in this letter that these people were not being forced to—  
A. Yes, sir, he did.

Q. —come back to work? A. Yes, sir.

449 Mr. Devaney: I haven't had this one marked.

(Tendering to Mr. Sharpiro)

Mr. Milledge: We all agree putting that in as part of the same exhibit, if that's all right.

Mr. Devaney: Just attach it as a second page to L.

The Court: To L?

Mr. Devaney: L.

By Mr. Devaney:

Q. Do you—is this the only position you hold, Mr. Cooke? In the Union? A. No, sir. I'm also President of System Federation No. 69.

Q. And as I recall, that is the organization of the six shop crafts? A. That's correct, yes, sir.

Q. But this letter, just for the record now, of February 8, you signed as General Chairman of the Brotherhood of Railway Carmen. You weren't signing this as System

Federation 69? A. That's correct. I signed it as General Chairman.

450 Q. Do you know whether the other members of the System Federation 69 signed a similar or identical letter to your letter of February 8? A. I could not say for sure; I think that some of them did but I am not sure of that.

Q. Was there any official direction by you, as President of System Federation 69, that such a letter be sent? A. No, sir, not from me; no, sir.

Q. Was there any action or consideration by System Federation 69 of the advertising for bids on jobs by the Florida East Coast? A. None, that I can recall; no, sir.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: No questions, Your Honor.

The Court: Suppose we break off for a few minutes here.

Mr. Devaney: Very good.

(Witness excused)

The Court: Maybe you can use this time to see where you stand.

(Short recess)

451

**R. M. Cooke**

was recalled to the stand and further testified as follows:

Further Direct Examination:

The Court: I thought we were through with Mr. Cooke.

Mr. Devaney: I neglected to ask him one question.

The Court: All right, sir. Go ahead.

By Mr. Devaney:

Q. Mr. Cooke, was John Katsikos a member of your union? A. Yes, sir.

Q. And was he a local officer of the union? A. Recording Secretary, I believe; yes, sir.

Q. And this was the Miami Lodge? A. Lodge 555, Miami.

Q. And was Mr. Katsikos one of the individuals indicted—

Mr. Milledge: Objection. I move the question be stricken.

The Court: One of the individuals, what?

452 Mr. Devaney: Indicted for bombing or attempted bombing of an F.E.C. bridge or train?

Mr. Milledge: I object to the question and move the question be stricken from the record.

The Court: What is the purpose of this?

Mr. Devaney: Well, as we said this morning, Your Honor, I think that there is a relationship here between the sabotage that has occurred on the railroad and the strike itself.

Now, the Government has premised this action on the theory, or has premised its argument on the theory that the Florida East Coast has greatly benefitted from certain rules that have been placed into effect.

The Florida East Coast has been subjected to very serious loss of property and of life by these threatened acts of sabotage. And I merely—

Mr. Milledge: Life?

453 Mr. Devaney: —asked whether—threatened loss of life; no life, fortunately, has been lost and no serious injuries have occurred as a result of these bombings. But the fact that you blow up a train while in movement is a very grave threat and one—

The Court: The fact that you have been indicted doesn't prove you did it either.

Mr. Devaney: No, I agree, Your Honor. I quite agree.

The Court: And if Mr. Katsikos did it, I don't see how this plaintiff in intervention, this Carmen's Union, is responsible for everything that Mr. Katsikos or any other union member does.

Mr. Devaney: No, that's quite correct, Your Honor.

The Court: I just don't see the relevancy of this. I'm

going to strike the question. I'll let him put his answer in. I assume that he is—that the answer will be yes; is that right?

The Witness: Yes, sir, he is.

454 The Court: All right. The question and answer are stricken. You have them in the record as a proffer.

Mr. Devaney: Very fine.

No further questions.

(Witness excused)

Mr. Devaney: At this time, Mr. C. J. Robbins.

**C. J. Robbins,**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. Would you state your name, please. A. Charles J. Robbins.

Q. And are you an official with one of the labor organizations? A. General Chairman of the American Train Dispatchers Association.

Q. And you were served with a subpoena duces tecum, were you not? Including the item, the Constitution and the By-Laws of your organization? A. That's right, sir.

Q. Now, that is one of the—do you have that  
455 with you now? A. No. I brought it in.

Mr. Devaney: This is one that I had not received, Your Honor. I wonder—

Mr. Milledge: I think we had it. I thought we had given it to you.

**By Mr. Devaney:**

Q. While Mr. Milledge is looking, you are also not one of the so-called eleven cooperating non-operating organiza-

tions, are you? A. That's right. The American Train Dispatchers are not on strike.

Q. Have you been working since January 23rd, 1963?

A. No, sir. We have been honoring the picket line.

The Court: Keep your voice up please, Mr. Robbins, and speak a little louder and more distinctly.

Mr. Milledge: He can probably tell us about the provisions.

By Mr. Devaney:

Q. Were you here, Mr. Robbins, when Mr. DuPont testified at some length with regard to the various provisions of the IBEW Constitution? A. Yes, sir, I was.

Q. And you are familiar with the stipulation that Mr. Milledge proposed for the eleven cooperating unions.

Now, you not being one of those, that stipulation binds you in no way, but does your Constitution have similar provision with respect to members working during the period of the strike? A. Probably. I have an older copy in my files over here, if you would like to look at that one. I have it.

Q. Fine. A. (Witness leaving stand, obtaining instrument and returning to stand)

Mr. Milledge: Here it is, Mr. Robbins. I did locate it. (Handing instrument to Mr. Devaney:)

Mr. Devaney: Would you mark this one also?

The Clerk: Defendants' M.

(The referenced document was received and filed in evidence as Defendants' Exhibit M.)

By Mr. Devaney:

Q. Now, you say that there only probably similar provisions; or are you reasonably certain, or do you wish to look at it? Do you wish to look at it and make certain? A. I would like to look at it and make certain.

Q. All right. A. Now, the question? Would you read the question, please?

Q. The question—you can read it—what I had asked earlier was whether, after having heard the testimony of Mr. DuPont in which he reviewed various provisions of the IBEW Constitution which related to the penalty against a member who worked for an employer during the course of an authorized strike, and then we examined the various provisions of membership and obligation of membership, et cetera, and I asked if—and Mr. Milledge stated on behalf of the eleven cooperating unions that they had similar provisions to those contained in the IBEW agreement.

Now, what I asked you is whether you had stated that you probably had such similar provisions. Then I asked—  
A. I now say that they do have such similar provisions.

Q. That they do have? A. Yes.

Q. All right, fine.

Mr. Milledge: I just would like to point out that  
458 this probably is not relevant, even along this line,  
because the Train Dispatchers aren't on strike. I  
don't believe they ever have been during this dispute; have  
they, Mr. Robbins?

The Witness: We have not been on strike, no, sir.

By Mr. Devaney:

Q. Now, Mr. Robbins, if I recall the testimony yesterday, it was stated that the American Train Dispatchers had bargained with the company concerning the company's notice of July 31st of the intention to terminate the union shop agreement; is that correct? A. He had bargained, yes, sir.

Q. Did this bargaining occur in the presence of a Court Reporter? A. Yes, sir, it did.

Q. Did you by chance order copies of the transcript?  
A. I did, sir.

Q. Now, the cancellation—

The Court: Was the answer that you did order copies?

The Witness: Yes, I did.

459 The Court: Thank you.

By Mr. Devaney:

Q. Now, the cancellation of the union—of your union shop agreement has never been placed into effect as to your union; is that correct? A. That's the way I understand it, yes, sir.

Q. Now, during the period of the strike, Mr. Robbins, have members of your union returned to work, to your knowledge? A. One of our members has returned to work.

Q. Has any disciplinary action been taken against him? A. None whatever.

Q. Have any new members been admitted, that is, new employees—A. No, sir.

Q. —hired since the strike began? A. No, sir.

Q. Now, Mr. Robbins, I show you this document which is marked as Defense Exhibit G, which is the "Strike Call and Instructions Pertaining to Conduct of Strike". Did you receive a copy of that or one similar to that issued by either the cooperating unions or any other union at or before the strike began on January 23? A. No, sir.

460 I don't recall ever having received a copy of that.

Q. Were you requested by one or more of the unions involved in this strike not to work during the period of the strike? A. No, sir.

Q. Were you informed in advance that the strike was going to begin? A. Yes, I had been informed.

Q. You were informed by the unions? A. I had had word by the unions, or a summons, and I also got word from the railroad that, as of such-and-such a day, our jobs were abolished.

Q. This was conditional on the strike occurring, wasn't it, Mr. Robbins? A. That's right, sir.

Mr. Devaney: Your Honor, subject to looking at the document marked as Defendants' M, which I have not seen until it was handed to me here this afternoon, I have no further questions of this witness at this time.



## Cross Examination

By Mr. Milledge:

Q. Mr. Robbins, you've got how many members in Florida? A. A total of five.

461 Q. A total of 5. So 20% of your people have gone back to work? A. That's right.

Mr. Milledge: That's all we have.

(Witness excused)

Mr. Devaney: Mr. C. S. Kerr.

The Court: Sir?

Mr. Devaney: Mr. C. S. Kerr.

## C. S. Kerr.

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

## Direct Examination

By Mr. Devaney:

Q. For the record, Mr. Kerr, would you state your name? A. Charles S. Kerr.

Q. Are you an official of the American Railway Supervisors Association? A. Yes. I am the District Chairman.

462 Q. Now, you received a subpoena to bring with you your Constitution and/or By-Laws? A. Well, I didn't have it here. There might be one over there in that pile.

Q. Then you have brought them? A. I didn't have anything to bring. I didn't have any records or nothing. I was put on as District Chairman and came at the same time as the strike, so I've never been involved in anything, period.

Q. So you don't have a copy of your Constitution? A. No, sir.

Q. You have been here, have you not, Mr. Kerr, during the period Mr. DuPont and others have testified about the obligation of employees and so forth? A. Yes, sir.

Q. To the best of your knowledge, is this the same obligation of membership that these other unions have, that is, not to work during—for an employer during the period of an authorized strike? A. No, sir, I don't think so, because we have some supervisors that are working that are members of the organization and paying their dues.

Q. Had you taken any disciplinary action against any of those people, Mr. Kerr? A. Not to my knowledge.

463 Q. Have you expelled any of them? A. Not to my knowledge.

Q. Have you admitted any new employees to membership? A. I don't know of any that even put in application. That would be handled by our General Chairman.

Q. By your General Chairman? A. Yes.

Q. Where is he located? A. C. W. Puckett. He's in Miami.

Q. Miami? A. Yes.

Mr. Devaney: No further questions of this witness.

#### Cross Examination

By Mr. Milledge:

Q. Are the Supervisors on strike? A. No, sir.

Q. You haven't been on strike? A. No, I never have been on strike. I was just cut off.

Q. And some of your men are back to work? A. Yes, sir.

The Court: You said you were cut off?

464 The Witness: Well, I received a notice from the company that, when the railroad went on strike, I didn't have no job no more.

The Court: Yes, sir.

Mr. Devaney: Mr. Kerr, just before you leave now—

The Court: Come back.

## Redirect Examination

By Mr. Devaney:

Q. Isn't it true that you received notices of jobs advertised for bids since February 3rd? A. No, sir; absolutely not.

Q. Are you saying that you would have accepted employment but was never—

The Court: He hasn't said that.

The Witness: I didn't say that. Now, I just answered your question.

By Mr. Devaney:

Q. Well, have you been informed of any jobs  
465 within your classification that have been posted for bids? A. No, sir.

Q. Have you made any effort to see whether bids were posted? A. No, that's up to them. They furloughed me. It's up to them to write me a letter whenever they have one that's open, if my seniority would entitle me to the job.

Q. Now, you say that the procedure in advertising bids requires that the individual furloughed must be— A. Absolutely.

Q. —advised by letter? A. How is he going to know otherwise?

Q. Have you been advised by—you say you have never been advised by letter of the availability of work since the strike began? A. No.

Q. You are positive of that? A. I am positive.

Mr. Devaney: No further questions, Your Honor.

The Court: Anything further?

Mr. Shapiro: No, sir.

(Witness excused)

466 Mr. Devaney: Mr. Winstead.

**Charles L. Winstead.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. For the record, would you state your name, Mr. Winstead. A. Charles L. Winstead.

Q. And are you an official of the Brotherhood of Maintenance of Way Employees? A. Beg pardon?

Q. Are you an official of the Brotherhood of Maintenance of Way Employees? A. I am General Chairman of the Brotherhood of Maintenance of Way Employees, Seaboard Federation.

Q. Now, does that include the Florida East Coast? A. It does, yes, sir.

Mr. Devaney: Now, I would like to have marked this—this is the Constitution you furnished, isn't it?

The Witness: Yes, sir.

467 The Clerk: N.

(The referenced document was received and filed in evidence as Defendants' Exhibit N.)

**By Mr. Devaney:**

Q. Now, you have heard the stipulation proposed by Mr. Milledge to the effect that the Brotherhood of Maintenance of Way Employees has similar provisions in its Constitution to those reviewed by Mr. DuPont with respect to the IBEW Constitution.

Is there any deviation from that? A. I don't know whether I'm correct in this or not. I think you read in his Constitution something about an obligation that they take them.

Q. Yes. A. I don't think there's any obligation in our Constitution and By-Laws, Mr. Devaney.

The Court: When a man enters a lodge, doesn't he take some kind of an oath?

The Witness: Sir?

The Court: Doesn't a man take some kind of an  
468 oath when he enters a lodge?

The Witness: Not to my knowledge, no, sir. It might be a local lodge matter, Your Honor.

The Court: I see. Thank you.

By Mr. Devaney:

Q. Now, except for the obligation of membership, Mr. Winstead, do the other deviations we talked about, that is, the subjection of the member to expulsion if he works for an employer against whom there is an authorized strike—  
A. I would say that's—

Q. —those provisions do apply I mean, you have similar provisions in your Constitution? A. I would say so, yes.

Q. Now, have there been any members of your organization against whom disciplinary action has been taken since January 23, 1963, and in connection with, who were former employees of the Florida East Coast? A. Not to my knowledge, no, sir.

Q. Now—

The Court: Would you be likely to know?

469 The Witness: Sir?

The Court: Would you be likely to know?

The Witness: Well, I think the Constitution and By-Laws would provide, Your Honor, that just action taken against a member would have to be by a member in the Local Lodge; and I don't have—

The Court: Would it be reported to you as General Chairman?

The Witness: I would think so, yes, sir.

Mr. Devaney: Now, one of the provisions, Your Honor, purely for the record, similar to those that we referred to earlier, is Article 21, Section 21, appearing on—the portion appearing on page 107, in particular; Section 7, on page 65; Section 8, on page 66; Section 2, on page 61.

By Mr. Devaney:

Q. Do you care to look at any of those? I didn't mean to—(Tendering to witness) A. You read them off so fast there.

Q. If I have made any errors since 61— A. You  
470 are talking about Section 2 here? (Indicating)

Q. Yes. A. What is your question about it?

Q. I didn't ask anything. I just said that these were similar provisions, were similar to those Mr. DuPont had pointed out and discussed. A. Yes, sir. I would assume that, yes, sir.

Mr. Devaney: I have no further questions of this witness, Your Honor.

Mr. Shapiro: No questions.

The Court: Mr. Winstead, your craft is one of the non-operating unions which is on strike, what's called the eleven non-operating cooperating—

The Witness: Yes, sir, Your Honor.

The Court: —crafts. So that you have been on strike since January 23, 1963?

The Witness: Yes, Your Honor.

471 The Court: Thank you.

By Mr. Devaney:

Q. Mr. Winstead, before you go, I find that you have given us a second document which is entitled "By-Laws of the Joint—" A. That's the System Federation By-Laws, Mr. Devaney.

Q. Well, it's entitled "For the Government of the Joint Protective Board and Members of Seaboard Federation". A. Yes, sir, that's correct.

Q. This is Seaboard, Jacksonville Terminal, Florida East Coast, Broward County Port Authority, Gainesville Midland Railroad and Norfolk Southern Railway. A. Correct.

The Clerk: O in evidence.

(The referenced document was received and filed in evidence as Defendant's Exhibit O.)

By Mr. Devaney:

Q. Now, turning your attention to that, Mr. Winstead, No. 7 provides as a preamble the objects of the Seaboard Federation are: No. 7, to require all members to faithfully and honestly perform their duties to the best of their ability for the Brotherhood and for their employers. And I guess that—perform to the best of their ability for the  
472 Brotherhood, their duties.

We asked Mr. DuPont, does that include the duty to honor any authorized strike call?

That's your Local By-Laws now. A. Well, there's nothing referred to in there, Mr. Devaney.

Q. I agree there isn't. This is a general term. But is one of the duties—is one of the duties to the Brotherhood an obligation or, as I say, you say you don't have an obligation; that is, it is expected that the members will obey any lawful action, including the authorization of the strike? A. Well, sir, there's nothing supposed to be in that Constitution and By-Laws that conflicts with the Grand Lodge Constitution and By-Laws.

Does that answer your question?

Q. Yes. We have established that nothing—that the Grand Lodge Constitution has such a provision. A. Well, there's not supposed to be anything in there to conflict with that.

Q. I understand. But this was the only one that I saw here that seemed to bear on this question. And I ask you, does it, even though it's general, does this have the same effect by imposing this duty on membership to abide  
473 by the rules of the union? A. Well, in my opinion, I would say yes.

Q. Fine.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: No questions, Your Honor.

The Court: Come down.

(Witness excused)

Mr. Devaney: Mr. Lanier.

**R. L. Lanier.**

having been produced and first duly sworn as witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Will you state your name for the record, Mr. Lanier.

A. R. L. Lanier.

Q. Are you an official of the Sheet Metal Workers International Association? A. I am the President and General Chairman of the Sheet Metal Workers, District Council 42.

Q. Is this the Constitution you gave us? (Indicating) A. That's right.

Mr. Devaney: Would you mark this, please.

The Clerk: P.

(The referenced document was received and filed in evidence as Defendants' Exhibit P.)

By Mr. Devaney:

Q. Now, you have heard the testimony of Mr. DuPont and the stipulation by Mr. Milledge. Is that stipulation that you have provisions similar to those contained in the IBEW agreement, do you have any reservation about this? A. No, I do not.

Q. Now, Mr. Lanier, has any disciplinary action been taken by your—by the Sheet Metal Workers International Association against any employee of the Florida East Coast Railway Company since January 23, 1963? A. No, sir.

Mr. Devaney: No further questions of this witness, Your Honor.

Mr. Shapiro: We have no questions, Your Honor.

(Witness excused)



475 Mr. Devaney: Mr. Dubberly.

**J. E. Dubberly.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. Mr. Dubberly, would you please state your name for the record. A. J. E. Dubberly.

Q. Are you an official of the Brotherhood of Railroad Signalmen? A. I'm General Chairman of the Grievance Committee.

Q. And this is the Constitution that you furnished? A. Pardon?

Q. This is the Constitution that you furnished? (Indicating) A. Yes, sir, that's it.

Mr. Devaney: Would you mark this, please.

The Clerk: Q.

(The referenced document was received and filed in evidence as Defendants' Exhibit Q.)

476 By Mr. Devaney:

Q. Now, you have heard the stipulation and the testimony of Mr. DuPont concerning the fact that you have similar provisions in your Constitution to those that were testified to by him in connection with the IBEW.

Now, do you have any reservation about that stipulation? A. No.

Q. Now, since January 23, has your organization taken disciplinary action against any employee of Florida East Coast Railway Company? A. How is that?

Q. Since January 23, 1963, has the Brotherhood of Railroad Signalmen taken any disciplinary action against any employee of Florida East Coast Railway Company? A. No, they haven't, not to my knowledge.

The Court: Well, it would be taken in your Committee, wouldn't it?

The Witness: Pardon?

The Court: You said you were General Chairman or

Chairman of the Grievance Committee?

477 The Witness: Yes, sir.

The Court: You can answer no?

The Witness: Yes.

The Court: Straight out without saying "not to my knowledge".

The Witness: Well—

The Court: It would seem to me.

The Witness: I will answer no, then.

By Mr. Devaney:

Q. Now, the Brotherhood of Railroad Signalmen are not members of System Federation 69, are they? A. No; no, sir.

Q. Now, these are the two documents marked for identification as Defendants' Exhibits G and D. Did your organization promulgate a similar document to this? A. Yes, they did.

Q. You did? A. Yes, sir, we did.

478 Q. Is it substantially identical to this? A. Well, I believe it is.

Q. Did you receive notice, or copies, or knowledge that organizations other than System Federation 69 and this one by the Brotherhood of Railroad—Railway Clerks had issued a document like this? Did you know of any others, other than these two, plus your own? A. No.

Mr. Devaney: I have no further questions of this witness.

Mr. Shapiro: No questions.

Cross Examination

By Mr. Milledge:

Q. The Signalmen are on strike? A. Yes, sir.

Q. You are one of the eleven cooperating non-ops? A. Yes.

Mr. Milledge: That's all.

The Court: Come down.

(Witness excused)

479 Mr. Devaney: Mr. Osban.

**B. R. Osban.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. Mr. Osban, would you state your name for the record, please? A. What's that?

Q. State your name for the record, please. A. B. R. Osban.

Q. And do you hold a position in the International Brotherhood of Boilermakers? A. Local Chairman.

Q. And this is the Constitution that you produced? (Indicating) A. Yes, sir.

Mr. Devaney: Would you mark this, please.

The Clerk: R.

(The referenced document was received and filed in evidence as Defendants' Exhibit R.)

480 By Mr. Devaney:

Q. Now, you have heard the testimony of Mr. DuPont and the stipulation by Mr. Milledge. Do you have any reservations concerning his stipulation that your Constitution has similar provisions to those contained in the IBEW Constitution? A. I presume it is.

Q. You don't disagree with that stipulation? A. No.

Q. Now, since the strike began on January 23rd, has disciplinary action been taken by the International Brotherhood of Boilermakers against any employee of the Florida East Coast? A. Not to my knowledge.

Q. And would this come to your knowledge? A. Not necessarily.

Q. I see. And what is your position again, sir? A. Local Chairman.

Q. Local Chairman? A. Yes, sir.

Q. And a Local Chairman is only over one locality?

A. Yes, sir.

Q. Whereas— A. Or where work is being done at  
481 points they don't have one in our craft, then I might  
have—

Q. I see. A. —something to do with it.

Mr. Devaney: I have no further questions of this witness, Your Honor.

The Court: Was he served a subpoena?

Mr. Devaney: Yes, he was, Your Honor; or at least we had him listed.

You did receive the subpoena, didn't you, Mr. Osban?  
Did you receive a subpoena?

The Witness: Yes, sir.

The Court: You haven't anything further?

Mr. Milledge: No further questions.

(Witness excused)

Mr. Devaney: Mr. I. E. Hamilton.

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**I. E. Hamilton.**

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

### Direct Examination

By Mr. Devaney:

Q. Would you state your name again for the record, please, Mr. Hamilton. A. I. E. Hamilton.

Q. And are you an official of the Order of Railroad Telegraphers? A. I am General Chairman of the System Division 87, F.E.C. Railroad.

Q. And these two documents are the Constitution and the By-Laws that you furnished? (Indicating) A. They are.

The Clerk: Defendants' Exhibits S—do you want this all one?

Mr. Devaney: Might as well.

The Clerk: Defendants' Exhibit S.

(The referenced material was received and filed in evidence as Defendants' Exhibit S.)

483 By Mr. Devaney:

Q. Now, since January 23rd, Mr. Hamilton, has any disciplinary action been taken against any employee of the Florida East Coast Railway Company? A. None coming under our agreement, no.

Q. What do you mean "none under our agreement"?

A. Well, those are the only ones I can answer for.

Q. I mean, what— A. I mean no telegrapher has been disciplined.

Q. I understand. I follow you.

You are saying that your union hasn't taken any disciplinary action then against any employee of the Florida East Coast Railway Company? A. None whatever.

Q. Now, is there any qualification or reservation that you wish to make with regard to the proposed stipulation by Mr. Milledge?

Now, he proposed— A. This speaks for itself. (Indicating) A member joining the order signs a pledge to live up to the laws and—to the laws and edicts of the order. But there's no long, drawn-out pledge like you had in Mr. DuPont's.

Q. Yes. Now, you are saying, however, that if he worked for an employer with respect to whom the telegraphers have an authorized strike, he would be subject to expulsion; isn't that—I mean, that's what Mr. DuPont had testified to. A. No, it doesn't say that.

Q. It doesn't say that? A. It doesn't say that. He would later be given a chance to clear himself, or whatever is necessary. He will be given a fair and impartial investigation.

In our case here, we are holding all of those in abeyance

until the strike is over, and no decision has been made on them.

Q. You mean you are going to try them after the strike is settled? A. No, I didn't say that.

Q. I'm sorry, I didn't understand.

You said you are holding— A. I said we are just leaving that matter in abeyance.

Q. What's the matter you're leaving in abeyance? A. The question of any of our members who are working for the F.E.C.

Q. You mean complaints have been filed or charges have been filed that members are working? A. No charges have been filed but I have received information that they are working.

485 Q. That they are working? A. That's right.

Q. And you are holding this whole matter in abeyance until the strike is over? A. That's right.

Q. This means that charges could be preferred after the strike is over? A. They could be, yes.

Q. And they could be expelled as a result of this? A. Yes, they could be.

Q. Has any person been admitted to membership since January 23, 1963, who is currently working for Florida East Coast? A. No, no one has applied.

Q. Now, as I read Article 2, Section 4, on page 9, among other provisions—or do you have that? A. I have it.

Q. Page 9. A. That's right.

Q. Now, this provides, among other things, that any member of a division may protest against the admission of any applicant. A. That's right.

Q. And the next paragraph says that if five mem-  
486 bers protest the admission of any applicant for membership and if the supporting reasons and evidence are construed sufficient by the division officers to justify the objections, the applicant shall be declared rejected. A. That's right.

Q. And that—in other words, that would bar an ap-

plicant from consideration without a vote of the membership? In other words, five members plus the officers would be sufficient; isn't this correct? A. Well, in the first place, in order to get an application in, he has to have three regular people to recommend his application but it takes five to over-ride the application and keep him from becoming a member. And they've got to have good and sufficient reason.

That has been done, was done a short time before the strike.

Q. Now, what was this that was done a short time before the strike? A. I understand we had a member—we had an applicant that we did not accept right under this particular rule.

Q. Yes. You mean where five people protested? A. That's right.

Q. Now, Article 12, Section 10, page 94, provides—  
Article 12, in general, is entitled, "Misconduct and 487 Penalties", and Section 10 provides:

"Accepting employment on any transportation company in any capacity where an authorized strike of the Order or any of its subordinate divisions exists."

A. That's right.

Q. So that that makes that act of accepting employment on the Florida East Coast an item subject to misconduct and penalties under Article 12? A. After he is given a fair and impartial trial.

Mr. Milledge: I believe this is what we stipulated. This was the same as all the rest.

Mr. Devaney: I realize, Mr. Milledge, but Mr. Hamilton indicated that there were some differences here and I felt obligated, in view of this, to review it. Otherwise, I quite agree with you.

No further question of this witness, Your Honor.

(Witness excused)

Mr. Devaney: The next witness will be Mr. Wyckoff.

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**R. W. Wyckoff.**

having been produced and first duly sworn as a witness on behalf of the plaintiff, was recalled as a witness on behalf of the defendants and testified further as follows:

**Direct Examination**

By Mr. Devaney:

Q. Mr. Wyckoff, you testified yesterday in this case and the oath will still be applicable today. You understand that? A. Yes, I do.

Q. Mr. Wyckoff, has it been a practice of the Florida East Coast for some period of time to take stenographic notes of all negotiating sessions? A. It has to my personal knowledge,—

Mr. Milledge: Excuse me.

The Witness: —since 1954.

The Court: Since when?

The Witness: 1954.

489 Mr. Milledge: We object because we feel this is irrelevant and not germane to the issues before the Court.

Mr. Shapiro: Your Honor, I would join that objection to the line of questioning. The reasons are substantially that the occasion, the causes which led to the breakdown of the negotiations, are not really—are not relevant to the complaint.

The Court: I'm going to overrule the objection and let the testimony stand that that's their practice.

By Mr. Devaney:

Q. Now, was this—were the minutes taken consistently from 1954 in all negotiations with unions, Mr. Wyckoff? A. Yes, it was.

Q. Was there ever any occasion prior to 1963 that any organization refused to bargain while you were taking



stenographic notes of the meetings? A. No, that question never came up.

Q. As a matter of curiosity, was a public stenographer used on each of these occasions? A. No. Prior to March 15, 1963, it was done by a member of the negotiating staff or team who was qualified to take shorthand.

Q. And since that time, why hasn't that been done? A. Well, because of the fact that I have no one on the staff now who is qualified to take shorthand and I don't have available secretarial help I could assign such duties.

Q. Now, in 1963, was there occasions on which negotiations, before August, were conducted with the unions in the presence of a Court Reporter? A. Yes, in the month of June there were a number of conferences held with various unions in connection with Section 6 notices that they had served.

Q. This was a notice that the unions had served? A. Yes, that's correct.

Q. And there was a Reporter present at each of those meetings? A. That's correct.

Q. And they obviously did not walk out if they continued the negotiations? A. That's right. The negotiations were continued with the Court Reporter present.

Q. Now, let's digress just one moment, Mr. Wyckoff: From 1954, were there occasions during which a Mediator from the National Mediation Board was present when stenographic minutes of the meeting were being taken? A. Yes, on several occasions.

Q. Could you tell us the names of the Mediators who were present on such occasions? A. Well, I can't recall them all at this time. Warren S. Lane was one. James Holleran was another.

Q. Did they ever object to your taking stenographic minutes? A. No, not at all. In fact, they made notes themselves.

Q. Did they take stenographic notes? A. I don't believe either one of them—I believe they wrote them out in long-hand.

The Court: You think they had a pad there and made some notes as they went along; is that what you are saying?

The Witness: Correct.

By Mr. Devaney:

Q. Have any of the union representatives made minutes during the course of your negotiations? A. Yes. A number of them make extensive notes.

Q. Could you give us an example of some of those who do? A. Vice-President Chester of the Trainmen's Organization is one. Former General Chairman Baum-  
492 berger of the Trainmen's Organization is another.

James Bearden, Grand Vice-President of the Clerk's Organization, is another.

Q. Now, when was the first time, Mr. Wyckoff, that there was a refusal on the part of the unions to meet in the presence of a Court Reporter? A. It was in connection with the notice I served to cancel the union shop. That's the notice of July 31, 1963.

Q. And that was the meeting that was scheduled for August 29? A. That's correct.

Q. Now, did you—was one of the Mediators assigned by the Mediation Board in January of 1964 a Mr. Newlin? A. Yes, I believe his name is J. Earle Newlin.

Q. With respect to which cases was Mr. Newlin assigned, involving what organizations; if you remember, Mr. Wyckoff? A. He was assigned to mediate five cases involving the International Association of Railway Employees.

Q. Tell us what occurred when Mr. Newlin arrived on the scene?

Mr. Shapiro: Objection, Your Honor. This line of questioning is not relevant or material to the issue in this action.

Mr. Devaney: Your Honor, we feel that it is  
493 material because it will demonstrate that Mr. Newlin  
declined to proceed with mediation, as he is required  
or is obligated under the Act to do; and this is merely one  
further stage in the failure of the Mediation Board to per-  
form properly its duties as imposed upon it by the Act.

The Court: Objection sustained.

In other words, I reach the conclusion that this thing  
wasn't relevant, reaching out from the other side to get  
it, it follows for me to—

Mr. Devaney: I understand.

For the record, may I say we would like to make a  
proffer of proof?

The Court: You can make a tender if you like.

Mr. Devaney: Tender and offer.

The Court: Dictate it into the record. I would be glad  
to have you do it.

Mr. Devaney: Yes, sir.

If permitted to do so, the defendant would prove  
494 by testimony of this witness that Mr. Newlin de-  
clined to meet in the presence of the Court Reporter,  
that he refused to call a meeting between the company and  
the IARE, even though the IARE had told Mr. Newlin and  
the company that it did not object to meeting in the presence  
of a Court Reporter.

Further, that the company urged Mr. Newlin to remain  
either on the premises or in his own motel room while the  
company met further with representatives of the union,  
and if and when they reached a point that they could not  
proceed further without the assistance of the Mediator,  
that the Mediator would be called to talk to the parties in-  
dividually to try and work out an agreement, and that all  
such individual meetings were to be in the absence of a  
Court Reporter; that Mr. Newlin refused to do so and that  
he left without making any further attempt to mediate the  
dispute.

The Court: I'm not quite clear when this occasion was.  
Mr. Devaney: This was in 1964. It was approximately March.

Is that right?

The Witness: March 18th through 20th.

495 Mr. Devaney: March 18 through the 20th of 1964,  
Your Honor.

The Court: And that was in connection with the IARE,  
some cases?

Mr. Devaney: With the IARE cases, Your Honor.

By Mr. Devaney:

Q. Mr. Wyckoff, did you—

The Court: That completes the proffer?

Mr. Devaney: That completes the proffer, yes, Your Honor.

The Court: All right. It's excluded on the objection already made.

By Mr. Devaney:

Q. Mr. Wyckoff, following the assignment of Mr. Newlin in connection with the IARE cases, did you have occasion to write Mr. O'Neill, who is the Chairman of the National Mediation Board? A. Yes, I wrote to Mr. O'Neill, I believe the date was April 21st, calling his attention to the excessively large number of cases which had been  
495 docketed by the Board involving disputes on the Florida East Coast and on which no active mediation had been taken, many of those cases having been docketed later than the cases on which—I mean, earlier than the cases on which Mr. Newlin had appeared on the scene to mediate.

Q. Now, is this, Mr. Wyckoff, a copy of your letter to Mr. O'Neill of April 21, 1964? A. Yes, it is.

Q. Now, did you receive any reply to that letter of April 21? A. I received no reply and, on May the 5th, I

believe it was, I again wrote to Mr. O'Neill concerning that matter.

On May the 11th, I believe, I received a response from Mr. Thompson calling—

Q. Let me interrupt you a minute now. I'm looking at a letter which is dated April 28. Is that the one that you meant to refer to rather than May the 5th? A. That's correct. I'm sorry. I had the date wrong.

Q. This is the second—this is the second letter to Mr. O'Neill? A. That's correct. The letter of April 28 is the second letter.

Q. Now, had you heard from your first letter when  
497 you—you wrote the first letter April 21, 1964? A.  
That's correct.

Q. Had you heard by the time you wrote the letter of April 28? A. No, sir. I had heard no word from the Board.

Q. Did you later hear from the Mediation Board? A. Yes. I received a reply from Mr. Thompson. He advised that Mr. O'Neill—

The Court: He didn't ask you what he said.

The Witness: I'm sorry.

By Mr. Devaney:

Q. Now, what was the date of that letter, Mr. Wyckoff?  
A. May 11.

Q. Did you ever get a letter directly from Mr. O'Neill?  
A. Yes. On May the 14th, I received a letter from Mr. O'Neill.

Q. And did you reply to that final letter from Mr. O'Neill? A. Yes, I did. On May 18th, I made a response to that.

Mr. Devaney: I ask that these be marked for identification and I now show them to the other attorneys.

498 The Court: Do you mind if we give the whole group—

Mr. Devaney: No, they are altogether, Your Honor.  
The Clerk: T.

(Thereupon, the referenced documents were marked Defendants' identification Exhibit T.)

Mr. Shapiro: Are you offering these, Mr. Devaney?

Mr. Devaney: I haven't yet; I shall in due course. Yes, if it will simplify matters, I will offer Defendants' Exhibit—the exhibits marked as Defendants' Exhibit T in evidence.

Mr. Shapiro: I shall object to the offer, Your Honor, on the ground that these letters are not relevant to the issues in this case or material in respect to the issues in this case.

It has been established that the Mediation Board has not conducted mediation with respect to the union shop dispute or with respect to the September 24, 1963 "Uniform Working Agreement", except as concerns the International Association of Railway Employees. And  
499 this exchange of correspondence which relates to the carrier's demand for mediation on all the cases that F.E.C. has with the Board, including many cases not involved in this action, is not relevant or material.

Mr. Devaney: Your Honor, we feel that this is entirely relevant.

In the first place, the letter of April 21<sup>st</sup> was written before there was any litigation in this case.

The Court: After the Trainmen case was decided and before this case was brought?

Mr. Devaney: That's right.

The Court: I say it was after the Trainmen case was decided and on appeal, and before this case was brought?

Mr. Devaney: That's right. And before any litigation in this case. Now—

The Court: They are excluded. Mark them for identification only.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, following your letter of  
500 May 18 to Mr. O'Neill, has there been any further  
response from Mr. O'Neill or the Mediation Board?

Mr. Shapiro: Objection, Your Honor.

The Court: Well, I assume the answer is going to be  
no, isn't it?

The Witness: That's correct.

The Court: All right. To nail this other thing down,  
this is the complete correspondence.

Mr. Milledge: Judge, while we've got just a moment,  
we've had these people here now for three days and I hope  
maybe, if there's going to be any more of the union people  
called, we might find that out so we could let them go.

The Court: Maybe the assumption was unwarranted  
but I assumed, when he quit calling these chairmen and  
representatives, that he didn't intend to call any more; is  
that a fair assumption?

Mr. Devaney: I'm sorry, Your Honor. Did I in-  
501 tend to call any of these gentlemen further?

The Court: Yes.

Mr. Devaney: No, I have no intention of calling them  
further.

The Court: They may be excused then under the sub-  
poena?

Mr. Devaney: Yes.

The Court: Of course, some of them—a great many of  
them represent plaintiffs in intervention here.

Mr. Devaney: Yes, sir.

The Court: Maybe they all do. They are certainly  
welcome to stay but there is no requirement that they re-  
main longer.

Mr. Milledge: Fine. That was the ruling I was seeking.

The Court: Mr. Devaney has merely released them from  
their subpoena.

Is that clear to all you gentlemen?



502 By Mr. Devaney:

Q. Mr. Wyckoff, just for the clarification, the IARE was the organization with respect to whom the September 24 notice was not placed into effect because they continued to bargain; isn't that correct? A. That's correct. They continued negotiations.

Mr. Devaney: I have no further questions of this witness at the moment, Your Honor.

Cross Examination

By Mr. Milledge:

Q. Mr. Wyckoff, I think this is what you testified to but I just wanted to be clear:

It wasn't until after the strike, until 1963, that you hired the public stenographer or the Court Reporter to sit in on these negotiations; is that correct? A. Well, that was the result of the shortage of secretarial—

Q. Well, all right.

The Court: At any rate, you had had somebody from your staff there. You never had a Court Reporter there until after the strike?

503 The Witness: That's correct.

By Mr. Milledge:

Q. Up to that time, each party took his own notes? A. Well, it was a little more than that.

Q. Well— A. A stenographic record was made of what transpired.

Q. Did you deliver it to the other party? A. No, I did not deliver it.

Q. That was just for your own use? A. Yes.

Q. Right. And they could take their own notes if they wanted to, and you took your notes? A. That's right.

Q. But starting after the strike, you started bringing in—what office is it? You used an office here in Jacksonville, did you not? A. Yes. We have a public Court Reporter that came in, that's right.



Q. Well, what is the name of that office? A. Mr. Rosenfeld.

Q. Sam Rosenfeld. So, since the strike or since—it was about—when was it you first used him? A. I think I testified just a minute ago it was March 15, 1963.

504 Q. All right.

Mr. Milledge: That's all.

The Court: You can come down.

(Witness excused)

The Court: What else do you have, Mr. Devaney?

Mr. Devaney: Your Honor, at this—this substantially completes it. I was going to ask if you would like to adjourn.

The Court: A little louder, please.

Mr. Devaney: I would like to ask if we might adjourn for the day, or take a short recess.

As far as I know, this completes the presentation of witnesses by the defendants. Before making an absolute commitment, I would like a brief recess.

The Court: Well, I'm agreeable. I was hopeful we could finish today, just as I hoped we could finish it yesterday, but I am not disposed to hurry anybody or make my own time requirements the basis for shortening up what-  
505 ever you gentlemen want to put in, whatever submission you want to make.

Now, you gentlemen might consider that, if you have rebuttal, you should be prepared to go ahead with it in the morning unless, in looking over his notes and reconsidering it, Mr. Devaney finds there are little bits and pieces he wants to put in. He has substantially completed it, as I understand him. And I think you both then should also be prepared to argue the case in the morning.

Mr. Shapiro: Yes, sir.

Mr. Devaney: Yes, sir.

The Court: Assuming that he closes and your rebuttal is short, then be ready to go ahead and argue. I think it would be an imposition on counsel and the attaches of the Court for me to keep you here later tonight.

Mr. Milledge: Your Honor, I may have to ask your indulgence that Mr. Rutledge be here tomorrow and I not be here. I'm not sure that my schedule has been rearranged or not.

506 The Court: Well, whichever it is, and—

Mr. Milledge: We will be prepared to make a short argument.

The Court: Well, we will leave it at that, Gentlemen.

Good night, Gentlemen.

Take an adjournment until 9:30 in the morning.

(Thereupon, at 5:20 o'clock p.m., on Wednesday, May 27, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m. on Thursday, May 28, 1964.)

507 (At 9:30 o'clock a.m., on Thursday, May 28, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had):

The Court: Good morning, Gentlemen.

Mr. Milledge: Good morning, Judge.

Mr. Shapiro: Good morning.

Mr. Devaney: (Tendering instruments to the Court)

Your Honor, these represent the copies that we made of Exhibits so that—

The Court: These, you are substituting?

Mr. Devaney: Yes, Your Honor.

The Court: You are going to return these papers to the various witnesses who produced them?

Mr. Devaney: Now, the only—

508 The Court: Some of them may have left yesterday afternoon, in which case I suggest you return them to Mr. Milledge and he can distribute them.

The Clerk: Yes, sir.

The Court: Some of them were anxious to get away and did leave yesterday afternoon.

Mr. Devaney: I would like to recall to the stand Mr. Wyckoff.

The Court: Come back, please.

**R. W. Wyckoff.**

having previously been sworn, was recalled to the stand and testified further as follows:

**Further Direct Examination**

By Mr. Devaney:

Q. Mr. Wyckoff, have there been occasions at which a Court Reporter was present when a Federal Mediator was present? A. Yes, there have.

Q. And could you tell us who the Federal Mediator was? A. Frank K. Switzer.

Q. And at this meeting, there were also representatives of the various unions present? A. Yes, mostly Grand Lodge officers.

509 Q. Do you recall when such a meeting occurred?

A. On July 24, 1963.

Q. Now, were there any occasions when meetings were recorded in any way other than by stenographic reportings?

A. Yes. I have had meetings that were recorded by means of a tape recorder.

Q. At which a Mediator was present?

Mr. Milledge: Excuse me. I'm not sure what kind of meetings we are talking about. Are we still on mediation or—

Mr. Devaney: Yes, sir.

By Mr. Devaney:

Q. The Mediator was present at such times? A. Yes, Mediator Switzer was present at those meetings.

The Court: I didn't hear who you said was present.

The Witness: Mediator Frank Switzer.

The Court: Switzer.

By Mr. Devaney:

Q. Now, were copies of these transcripts furnished to the Mediator who was present at each of these meetings? A. Yes, they were.

510

Q. Now, Mr. Wyckoff, over the years, has there been any occasion to make use of the minutes of these negotiating meetings? A. Yes. They are referred back to frequently.

Q. In what manner, Mr. Wyckoff? A. Well, frequently a question arises as to the intent of the parties at the time a rule was negotiated or revised. And that is the main reason for referring back to them.

Q. What sort of—You mean these are disputes with the unions involving the application of a particular agreement? A. That's correct. And frequently those disputes go to the Railroad Adjustment Board in Chicago and, of course, the Board, with usually a neutral sitting-in on the case, refers to the intent of the parties at the time a rule was negotiated to determine whether or not it was being complied with.

Q. And in these proceedings before the Adjustment Board, have you had occasion to refer back to these minutes and make use of the content of these minutes? A. Oh, yes. The information contained in the minutes is invaluable in preparing cases for submission to the Board.

Q. Do you also have any occasion to refer to the minutes in your discussions with the unions concerning these  
511 various cases that are brought? A. Yes. At preliminary discussions on the property, frequently reference is made to the discussions and what transpired.

Mr. Devaney: I have no further questions at this time, Your Honor.

Mr. Shapiro: I have a few questions, Your Honor.

The Court: Yes, sir.

#### Further Cross Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, when was the Mediation session at which a tape recorder was used? A. There were two such sessions. One was on June the 18th. The other was on June 22nd, 1963.

Q. Both in 1963? A. That's correct.

Q. Had a tape recorder been use in any session involving a Section 6 notice, either private negotiations or mediation, prior to 1963? A. Prior to 1963, no; because, as I said yesterday, a member of my staff at that time was  
512 qualified to take the minutes in shorthand.

Q. Now, prior to 1963, did you have verbatim transcripts prepared of negotiation sessions? A. Not necessarily verbatim, no; but a resume was made of what transpired. In other words, it would be taken down verbatim and then a resume would be transcribed.

Q. You testimony is that you did have a verbatim shorthand record prepared? A. That's correct, because I myself did it on a number of occasions.

Q. You take shorthand? A. Yes, I do.

Q. And you prepared verbatim shorthand records? A. I transcribed—I transcribed it in a resume form so that—

Q. So that they were not verbatim records; they were resumes? A. The transcription was a resume but, during the process of the discussions, it was taken down verbatim.

Q. And this continued, so that you had a word-for-word record; is that right, in shorthand form? A. In shorthand, that's correct.

Q. You yourself, while you were negotiating, at times made a verbatim record in shorthand? A. I didn't  
513 say that.

Q. I'm asking that. A. No. While I was on the negotiating team of the railroad, from 1954 on until December of 1960, I did it. In December of 1960, I was made Director of Personnel and then, at that time, another member of my staff was qualified to take shorthand.

Q. Between 1954 and 1960, you testified—I'm just trying to clear this up— A. Uh-huh.

Q. Is it your testimony that, between 1954 and 1960, you yourself took a verbatim shorthand record of the negotiations? A. That's correct.

Q. Were you also actively participating in the discussions? A. I participated in them,—I won't say actively—because the man who was negotiating did all the talking usually.

Q. And you simply sat and took a shorthand transcript down; is that right? A. That's correct.

The Court: What officer of the railroad was that,  
514 the Chief Negotiator, during those days?

The Witness: Mr. C. L. Beals.

By Mr. Shapiro:

Q. Is he in the Personnel Department? A. He was the Chief Operating Officer of the railway and he handled the negotiations.

Q. When was the Court Reporter used for the first time, Mr. Wyckoff, in a negotiating session? A. On March 15th, 1963.

Q. Now, just to clear up your testimony at this time in the light of your testimony yesterday: Would it be accurate to state that no verbatim transcript of the negotiating sessions was prepared prior to 1963? A. I would say that was correct, yes. There really wasn't any reason for having a verbatim transcript as long as we had the intent of the negotiators; and I had the shorthand notes to refer back to.

Q. Now, did other parties make notes of some kind during the negotiating sessions? A. Oh, yes.

Q. And can you testify as to the use that these other parties might make of them? A. I assume they referred back to them at times subsequent to the negotiations.  
515 I don't know what they did with them.

Q. Does the Florida East Coast Railway Company have stenographers in its employ at the present time? A. Yes, it does.

Q. And would they be available to assist in preparing notes from which resumes could be made? A. We don't have the availability of secretarial help that we had prior

to the strike, and because of a shortage of secretarial help, I had to devise other means of recording these conferences.

Q. So the means you devised was to hire a Court Reporter? A. That, or use a tape recorder.

Q. Why didn't you just hire an ordinary stenographer to make the same kind of notes that had been made previously? A. Because a stenographer has to have quite a degree of ability to record the conferences verbatim. Someone—

Q. Do you have sufficient shorthand skill to take verbatim notes? A. I don't say I have at this time, because I haven't utilized it since 1960; but prior to 1960, I did.

Q. Did the—When did the representatives of the labor organizations first question the use of a Court Reporter? A. I believe that they questioned the use of a Court Reporter at the meeting of March 15th.

Q. And did they reiterate that objection at any time? A. Well, they questioned the use of the Court Reporter but they remained and negotiated.

Q. At that time—now, when were they—was it a company policy—let me rephrase the question.

Did you ever inform the representatives of the labor organizations that the company would hereafter insist upon a Court Reporter? A. I told them that it would be the policy from here on to have a Court Reporter present during negotiating sessions, yes.

Q. When was that? A. Oh, I don't recall the exact date. I believe it was the meeting of June 15th on the employees' Section 6 notices—on or about June 15.

Q. And what did the employees tell you? A. Well, they reiterated their objection to a Court Reporter being present but they continued to negotiate on their notices.

Q. Mr. Wyckoff, have you participated in mediation sessions? A. Yes, I have.

517 Q. Was a verbatim transcript ever prepared of a mediation session, prior to the sessions which you described in your direct testimony? A. I won't say that



there was a verbatim transcript made. A verbatim record was made at a number of those and I made that record in shorthand.

Q. You state that it was a verbatim record? A. I took the notes in shorthand verbatim, correct.

Q. Mr. Wyckoff, did you ever dispute the authenticity of the notes of any labor organization on a recording—on a negotiating or grievance session? A. I don't recall that I ever saw the notes of a labor organization to review them. I saw them taking the notes.

Q. Now, was there ever a dispute about the authenticity of your notes? A. I believe on occasions that they have stated they would not be bound by any record that was made, unless it was signed by them.

Q. Now, these typed—let me distinguish between the stenographer's notes and the typed resume in my questions so it will be clear:

These typed resumes were for your use in taking a position on what the intent of the parties was; is that right?

A. That's correct. Frequently a question arises as to the intent of the negotiating parties and, in order to be certain of the intent, you refer back in the file to the minutes of what transpired.

Q. And then these are used to state a company position in a grievance proceeding and the like; is that right?

A. Not only to state the position but to state the intent of the negotiating parties at the time the rule was negotiated.

Q. You mean you take your notes and state that this is evidence of what the intent of the parties was? A. That's correct.

Q. Your own notes? A. Oh, sure.

Q. Your own resume? A. That's correct. In fact, I had occasion just recently where the Trainmen's Organization disputed the intent of a rule and I referred back in the file to the intent of the negotiator and saw it was completely contrary to what the Trainmen's Organization contended.



And I went to him and asked him about it and he gave me a sworn affidavit as to what his intent was.

The Court: Went to whom?

The Witness: This happened to be Mr. Beals.

519 The Court: Based on what your notes showed, he gave you a sworn affidavit of what his intent was?

The Witness: That's correct.

The Court: Mr. Beals is pretty elderly now, isn't he?

The Witness: Yes, he's in his 70's, I believe 75.

The Court: He retired just about the time the road came out with the organization, or just before?

The Witness: Just before, I believe.

Mr. Shapiro: I have no further questions.

#### Further Cross Examination

By Mr. Milledge:

Q. I believe you stated that the reason you changed the practice was because of the shortage of personnel caused by the strike; is that what you said? A. I said a shortage of secretarial help.

Q. Your'e not telling the Judge that you were using  
520 union stenographers to take down your notes at bargaining sessions, are you? A. I'm not saying I was using union stenographers, no. But those stenographers were used for other purposes, to take the place of union members who were out on strike when the strike began.

Q. All right. So the reason, you are telling His Honor, that the reason you change this policy in 1963 was from a shortage of manpower due to the strike? That's your testimony? A. That's correct.

The Court: Well I have one question. I'm speaking of the sessions when you used the tape recorder.

Were those out in the open, like Mr. Sheridan, my Reporter's, gear is here?

The Witness: Yes, sir.

The Court: Or were they concealed microphones and the recorder in another room?

The Witness: No, sir. The recording device was sitting right on the table alongside of Mr. Switzer. In fact, 521 he asked—one of his first questions was, “Is this thing operating?”.

Mr. Shapiro: May I ask one further question, Your Honor?

The Court: Yes, sir. I wanted to be sure in my mind when this was that Mr. Switzer was present. What were the dates of those two sessions? Did you state?

The Witness: If my memory serves me correctly, Your Honor, they were June 18 and 22, 1963.

The Court: That’s what my notes showed but I wasn’t sure it referred to this matter.

All right, thank you.

You may go ahead.

#### Further Cross Examination

By Mr. Shapiro:

Q. Do you recall any occasion on which there was a question as to whether or not the tape recorder was on in a mediation session? A. Yes, I do.

Q. What was that? When was that? A. That was a discussion with Mr. O’Neill and Mr. Holleran, who is 522 also a Federal Mediator. They participated in a meeting with Mr. Thornton and myself and several members of my staff. The tape recorder was sitting within three or four feet of Mr. O’Neill’s arm. He could reach out and touch it. There was a man sitting alongside of it operating it and, after approximately ten or fifteen minutes, he wanted to know whether the machine was being utilized. I told him it was.

Q. The discussion had gone on ten or fifteen minutes and he stated— A. That’s right.

Q. And then what happened? A. He requested that the machine be removed and I told him no, that I was making a record of what transpired. Of course, that was obvious,

or should have been obvious to him. He saw the machine in operation, or should have seen it.

And when I would not remove it, why, he left the room; he and the other Mediator, Mr. Holleran.

Q. All right, Mr. Wyckoff, will your company negotiate without a Court Reporter present or a tape recorder?

A. We will meet with representatives of the Government without a tape recorder or a Court Reporter present; but any time that a union representative is present, a verbatim record will be made of what transpires.

523 Q. Then your answer to my question is that—let me be clear:

You will not negotiate with a union representative without a means of making a verbatim transcript; is that right?

A. That's correct.

Mr. Shapiro: Thank you, Mr. Wyckoff. I have no further questions.

### Redirect Examination

By Mr. Devaney:

Q. Mr. Wyckoff, before 1963 when the minutes were taken by you or a member of your staff, was there any occasion when the union representatives made any comment about this practice? A. Yes, they observed the notes being taken and I think, on one or two occasions, they requested copies of the transcripts.

Q. There was no doubt that they were aware that this was being taken? A. Oh, no. They knew it was being taken. I don't recall any protest of it being taken, but I think they did request copies of the transcript.

Q. Now, in this meeting where you mentioned  
524 these International officials, could you tell us who some of those individuals were? A. As best I recall, Mr. Leighty, Mr. Dennis; Mr. Leighty is of the Telegraphers' Organization and also Chairman of the Cooperating Labor Organizations involved in the present work stoppage.

Mr. Dennis, who is Grand President of the Clerks' Organization.

Mr. Bernhardt, who is President of the—one of the shop crafts.

Mr. Fox, who is President of System Federation 69.

Mr. Crotty, who is President of the Maintenance of Way Employees.

That's all I can recall at this moment.

Q. Was any comment made by any of those union officials concerning whether a record was made of the negotiations on any other railroad? A. Yes. Mr. Leighty commented that—

Mr. Milledge: Excuse me. Objection; hearsay.

The Court: Objection sustained.

By Mr. Devaney:

Q. Was there an occasion later, Mr. Wyckoff,  
525 when Mr. Leighty was attending a meeting at which  
a Court Reporter was present? A. Yes. He and  
Mr. Schoene, who is an attorney for the Railway Labor  
Executives Association, attended such a meeting in December of 1963.

Q. Do you recall, Mr. Wyckoff, whether there was any objection to the reporter being present at that time? A. To my recollection, there was absolutely no comment made at all about the recorder's presence.

Mr. Devaney: No further questions.

The Court: Recorder or Reporter?

The Witness: Reporter, I'm sorry, sir—Reporter's presence.

Mr. Devaney: No further questions.

The Court: That was Mr. Rosenfeld or one of his associates?

The Witness: Mr. Rosenfeld personally was there.

Mr. Shapiro: No further questions.

526 The Court: All right, sir, would you come down.

(Witness excused)

Mr. Devaney: Your Honor; that completes the evidence that the defendant wishes to present at this time.

Mr. Shapiro: Your Honor, the first rebuttal witness for the Government will be Mr. W. F. Howard, who testified yesterday.

The Court: Mr. Howard.

**W. F. Howard.**

having previously been sworn, was recalled as a rebuttal witness on behalf of the plaintiff, and further testified as follows:

Direct Examination

By Mr. Shapiro:

Q. Do you recall, Mr. Howard, that you were placed under oath yesterday? And you are still under oath. A. Yes, sir.

Q. Could you state once again the organization with which you are associated and your position in it? A. I am General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and  
527 Station employees.

Q. Now, Mr. Howard, have you attended negotiating sessions on rates of pay, rules and working conditions with the Florida East Coast Railway Company? A. Many of them, beginning in 1937.

Q. And what kind of subjects were discussed in those sessions that you have attended? A. Well, I was involved in at least five mediation proceedings beginning in 1937.

The Court: '37 or '57?

The Witness: '37, Your Honor.

The Court: That was the date you gave earlier?

The Witness: Yes, sir.

The Court: I took it '57; I'm sorry.

The Witness: And the last two were in the Spring and Fall of 1962. And the '37 mediation case involved a complete agreement. We had been certified as representative

of the employees on April 10, 1937, and we began  
528 negotiations in May, as I recall, in 1937 and they  
terminated and we engaged in negotiations inter-  
mittently until an agreement was reached through media-  
tion on December 20, 1937.

And we were also involved in revisions of those rules  
in 1941, 1946, 1951; and we completely revised the agree-  
ment again in 1962.

The Court: '62?

The Witness: Yes, sir.

By Mr. Shapiro:

Q. Now, how did the parties keep track of the various  
discussions in the negotiations you have described? A.  
Well, in the 1937 negotiations, as I recall, Mr. Beals' per-  
sonnel staff consisted of Mr. F. L. Atkinson, who was the  
Assistant to Mr. Beals. At that time, Mr. Beals was the  
General Superintendent. And later, Mr. G. N. Holman,  
neither of whom wrote shorthand and they made their  
notes in the same manner that I—not in the same manner  
I did, because I made mine in shorthand.

Q. Were your notes verbatim? A. No, they were not.

Q. Now, in the later negotiations, how did people  
529 —how did the parties keep track of the various dis-  
cussions? A. Well, when Mr. Beals' staff was in-  
creased and there was a stenographer on his staff, person-  
nel staff, they made notes intermittently. But I have never  
know of a verbatim report having been made.

Q. Now, how do you know the stenographer wasn't taking  
a verbatim record down? A. Because I observed him during  
the negotiations. As a matter of fact, being a stenographer  
myself, they couldn't have kept up with the conversation  
that was going on.

The Court: They don't always wait for—the second  
fellow doesn't always wait for the other one to stop talk-  
ing, like they do in Court, do they?

The Witness: Well, as a rule, one person exhausted his opinion before the other started out.

By Mr. Shapiro:

Q. Now, was this true—Did you participate in any negotiating sessions at which Mr. Wyckoff was present? A. Yes, beginning in 1954, Mr. Wyckoff was present. And one of the notable agreements that we negotiated while Mr. Wyckoff was on the staff was the agreement of 530 February 4th, 1959, dealing with automation. And there certainly were no verbatim notes made during those negotiations, which were quite extensive.

Q. How about the 1962 negotiations? A. No verbatim notes were made. Each side made notes and I do recall, as Mr. Wyckoff testified a few moments ago, that he did make some notes in shorthand but they were not verbatim. The reason why I recall him making notes in shorthand is because we discussed the different systems used—as he used as compared with what I used.

Q. Now, how do you know that his notes weren't verbatim? A. He was sitting immediately in front of me and I observed him.

Q. Was he continuously taking notes as the conversation went on? A. No, he was not.

Q. What did you observe as the discussions were going on? What was Mr. Wyckoff doing? A. Well, as the discussions were going on, as we were trying to reach an understanding on our agreement of certain language of the proposed rules, we both would make notes of how we would agree to change the language in certain rules, and he would make notes. Sometimes he made notes in long-hand that I observed.

531 Q. So that you concluded from this that he was not making a verbatim record then? A. That's correct.

Q. When was the first time you participated in a negotiation at which someone was taking a verbatim record? A. It was in June of 1963. I don't recall the exact date.



Q. In June of 1963. Now, have you participated in mediation, Mr. Howard? A. I've participated in at least five mediation proceedings with the carrier—this carrier.

Q. Did you observe anyone from the company making a verbatim record? A. No. And on the first occasion, there was no one there qualified to take shorthand notes.

Q. How about on the later occasions? A. Neither in the 1941 mediation was anyone present.

Q. Now, did you understand that the company would make available to you or to anyone else who desired it, the resume that it had prepared? A. No, I never discussed it with them. I had no occasion to use it because I had my own notes.

Q. You relied on your own notes? A. Right.

532 Q. How does one acquire a copy of the transcript prepared by the public Court Reporter? A. He has to purchase it from the Reporter.

Q. Can anybody purchase one of those? A. As far as I know, they can.

Q. So that the— A. I've never purchased one myself.

Q. If I wanted to purchase a copy of the negotiations between the Florida East Coast Company and your organization in June of 1963, could I purchase one from the Court Reporter? A. I assume that you could.

Q. So that the record is a public record? A. As far as I know.

Q. Of your private negotiations? A. Correct.

Mr. Shapiro: I have no further direct questions of this witness.

The Court: Do you have any questions, Mr. Milledge?

Mr. Milledge: No, Your Honor, I do not.

The Court: Cross-examine.

533 Cross Examination

By Mr. Devaney:

Q. Mr. Howard, did I understand you to say that you knew that Mr. Wyckoff, in 1962, was not making a verbatim



record because he sat in front of you? A. That's right.

Q. Now, you also heard Mr. Wyckoff testify that he had not made these minutes since 1960; isn't that correct? A. I don't recall his testimony.

Q. Now, prior to 1962, you said that you were positive that Mr. Wyckoff did not make a verbatim shorthand record.

Now, did he sit in front of you each time? A. He sat at the left of me.

Q. Every time from 1954? A. At all conferences.

Q. Now, how would you know whether he was taking a verbatim record or not, Mr. Howard? A. Well, I could tell by watching him. When Mr. Beals or someone else was talking, that he was not making notes. He made notes intermittently.

Q. Is this man taking a verbatim record, sitting here, Mr. Howard? A. I haven't observed him.

Q. Now, did you say that Mr. Frank Atkinson  
534 could not take shorthand, to your personal knowledge? A. In 1937, he could not.

Q. You are positive of that? A. I'm positive of that because, in later years, he did learn to write shorthand.

Q. So that after 1937, he could take notes in shorthand? A. Well, it must have been at least fifteen years after that.

Q. So that, some time by 1952, he was taking shorthand; is that not correct? A. I wouldn't—I couldn't pinpoint the year, but I do know that he did learn shorthand some years later, following some trouble he had with his throat that the doctors wouldn't let him talk for several months.

Q. Now—

The Court: Who is this?

The Witness: Mr. Atkinson.

The Court: Oh, yes.

By Mr. Devaney:

Q. Isn't it true, Mr. Howard, that you ordered four copies of the transcript of one of the meetings at which

535 Mr.—the Court Reporter's name I don't remember; Sam Rosenfeld, is it? Is that the name of the Reporter? A. That's the name of the Reporter but I did not order any copies.

Q. You did not order any? A. I think that Mr. Winstead—

Q. Mr. Winstead— A. —ordered some copies.

Mr. Milledge: I missed that.

This is in 1963, I assume?

The Witness: Yes.

Mr. Devaney: That's in 1963.

Mr. Milledge: All right.

By Mr. Devaney:

Q. I wasn't certain of the date of this last mediation that you referred to, Mr. Howard. What was that year? A. 1962.

Q. 1962? A. We had two mediation proceedings during that year.

Q. This is the one you said that the agreement was  
536 completely revised? A. With the exception of a few rules, but we rewrote, reprinted, the entire agreement.

Q. Now— A. That was in the Spring of 1962.

Q. Spring of 1962? A. Yes.

Q. Now, Mr. Howard, are you willing to meet with the company in negotiations with a Reporter present? A. No, I am not.

Q. Are you willing to meet if the record is made by somebody who is not a Court Reporter per se? A. No. I don't think that I would be agreeable to meeting with them where any verbatim record was kept, because I don't believe it's conducive to good-faith bargaining.

Q. Yet you make your own verbatim record of at least portions of the negotiations? A. No, I don't make any verbatim records.

Q. Why do you take—what do you write in shorthand? A. The understanding we had about whether a certain

proposed rule would be accepted or rejected or passed over to some later date for discussion of the proposed rule; the language; the change in the language of the proposed rule, which is in writing.

537 Yes. But how do you write that understanding, Mr. Howard, without writing down what has been said? A. I just make a resume. In the case of change in language, I put that down exactly as we discussed it.

Q. I see. So it's the—In other words, you don't object to having part of it verbatim but you don't want other parts of it verbatim; is that correct? A. No. The only reason why I make any record at all is it's customary for the carrier to type up the rules that we agree upon and I check that back against my notes to see that that's exactly what we agreed upon.

Q. Now, would it also follow, Mr. Howard, if the company prepares this, that they must have some record of what has been agreed upon in order to prepare the written agreement itself? A. I didn't understand the question.

The Court: Do they need some notes to write up from too?

The Witness: Yes, they make notes.

Mr. Devaney: So they need those notes—

The Court: He is asking do they need them?

538 By Mr. Devaney:

Q. They need the notes to write up the agreement, do they not, Mr. Howard? A. That's right. And many times, I'll dictate the proposal myself and many times, more often than not, those are written in longhand.

Q. Now, what is written in longhand, Mr. Howard? A. These rules that we've changed around.

The Court: The final formulation of the rules?

The Witness: Correct. Many times it will be written in longhand and sent out to a stenographer outside the room and typed up and is brought back in and we have further discussion on it, and we may make some changes beyond that.

Mr. Devaney: No further questions, Your Honor.

The Court: Anything further?

Mr. Milledge: No, sir.

The Court: Come away, Mr. Howard.

539 Mr. Shapiro: May I have one more question?

The Court: Oh, I'm sorry.

### Redirect Examination

By Mr. Shapiro:

Q. Mr. Howard, why do you object to having a commercial Court Reporter present? A. I would object to a commercial as well as one employed by the company making a verbatim record, because I'll have to agree with the opinion expressed by Mr. Reynolds, Assistant Secretary of Labor. It seems that the person doing that is more interested in making a record than they are in bargaining.

Q. Do you think there's any difference between a record made by the public Court Reporter and the record made by the transcript—a record made by a stenographer employed by the company?

Mr. Devaney: Your Honor, I object to this. I think this calls for a conclusion.

The Court: You opened it up on your cross-examination, Mr. Devaney.

You may answer.

540 The Witness: You mean a verbatim record?

Mr. Shapiro: Yes.

The Court: He's asking do you make any—do you draw any distinction between one made by a regular company employee and one made by a public stenographer?

The Witness: Not a bit.

The Court: Sir?

The Witness: Not a bit; I make no distinction.

The Court: Well, I can suggest one that you suggested in your earlier testimony; that anybody that wanted one might be able to procure one from the public stenographer,

unless there was an agreement that he was instructed not to release it to any member of the public.

The Witness: I've never had any desire to secure one from either side.

541 The Court: I understand that.

The Witness: If one had been made.

Mr. Shapiro: I have no further questions, Your Honor. Thank you, Mr. Howard.

(Witness excused)

Mr. Shapiro: I would like to call one more witness. Mr. R. M. Cooke.

**R. M. Cooke,**

having previously been sworn, was recalled as a rebuttal witness for the plaintiff and further testified as follows:

Direct Examination

By Mr. Shapiro:

Q. For the record, will you state your name? A. R. M. Cooke.

Q. And you recall that you are still under oath from yesterday? A. Yes, sir.

Q. What organization are you with, sir? A. I'm General Chairman of the Brotherhood of Railway  
542 Carmen of America and President of System Federation No. 69.

Q. This is the shop crafts organization? A. Yes, sir. That's the shop crafts organization.

Q. Now, you represent—do you participate in negotiations involving all of the shop crafts, all five unions? A. Yes, sir.

Q. It is five? A. It's six, really.

Q. Six.

How long have you been participating in the negotiations? A. Well, as General Chairman, since November 1st, 1959; and as President of System Federation 69, several

months later, eight or ten months, I can't recall the exact date that I was made President.

Q. Now, have you attended negotiating sessions with the Florida East Coast Railway Company on changes in rates of pay, rules and working conditions? A. Yes, sir.

Q. How were the records kept at these sessions for your organization? A. (No response)

Q. I'm sorry, that is a pretty vague question.

How did the parties keep track of the negotiations?

543 A. Prior to June of 1963, merely by keeping our own personal notes of pertinent points from time to time; but, beginning in June of 1963, there was a Court Reporter present.

Q. Did the company have a stenographer present at these negotiating sessions? A. No, sir.

Q. They did not have a stenographer present for your organization? A. Not at any that I attended, no, sir.

Q. Then no verbatim record was being prepared of any kind? A. None that I saw being prepared, no, sir.

Q. Now, you mentioned that up until June of 1963, no verbatim transcripts were prepared. What happened in June, 1963? A. Well, at a meeting in June, 1963, between the General Chairman of System Federation 69 and Mr. Wyckoff, there was a Court Reporter present.

Q. Did you say anything about that Court Reporter? A. Yes, sir. We began the session by voicing an objection to his presence.

Q. What happened then? A. Well, Mr. Wyckoff informed us that the Reporter would remain there and  
544 would take the minutes of the session, and that also in the future that such sessions would be recorded.

Q. Have you ever seen a transcript of this session? A. Yes, sir, I have seen a copy of it, of the session.

Q. I show you a document entitled "Conference Between Florida East Coast Railway Company and Federation System 69", and listing several labor organizations, "Held at the Offices of Florida East Coast Railway Company, at

King and Malaga Streets, St. Augustine, Florida, on Tuesday, June 25, 1963, at 1:00 p.m.".

Now, is this the transcript of the meeting you have described to us? A. Yes, sir, this is the transcript made by Mr. Rosenfeld.

Q. Who was Mr. Rosenfeld? A. Mr. Rosenfeld is a Court Reporter, I believe from here in Jacksonville.

Mr. Shapiro: I ask that this be marked as Plaintiff's Exhibit—

The Clerk: No. 8. See if there is any objection.

Mr. Shapiro: I will show it to him. (Handing instrument to Mr. Devaney)

(Thereupon, the referenced document was marked Plaintiff's Identification Ex. No. 8.)

545 Mr. Shapiro: I offer this in evidence.

Mr. Devaney: Your Honor, I object only to the materiality of putting the entire transcript in. Otherwise, I have no question of the authenticity of the copy offered, but I don't see that it's material to this case; but if it is desired to put it in, I have no objection to its authenticity.

Mr. Shapiro: I shall by further questioning demonstrate the materiality of it, since Mr. Cooke has testified concerning the presence of the Court Reporter and the objection by the company—or the objection by the labor organization and the statement by the company that there would be Court Reporters present. I think that this would be most important to that testimony.

Now, we can limit the offer of the item in evidence to certain pages at the beginning.

The Court: Oh, well, put the thing in. I'm certain it isn't offered as evidence of the truth of any matters asserted there but as, I suppose, to show how the conference was conducted.

546 Mr. Shapiro: Yes, Your Honor, and to—

The Court: I do note it opens up by Mr. Wyckoff indicating who Mr. Rosenfeld is and Mr. Cooke voicing



an objection to his being present but going ahead in spite of him.

I'll receive it. It may have some evidentiary value. It's received, No. 8 for the plaintiff.

(Thereupon, Plaintiff's Identification Exhibit No. 8 was received and filed in evidence.)

By Mr. Shapiro:

Q. Mr. Cooke, would you examine this and tell me the point at which the discussion over the presence of the Court Reporter ended?

The Court: I think I may determine that myself.

Mr. Shapiro: You certainly can, Your Honor, and—

The Court: I think that we don't need the witness to do that.

Mr. Shapiro: Well then, on that basis, I'll withdraw the question.

547 The Court: Do you want to limit your offer to those pages; is that it?

Mr. Shapiro: Yes, sir, that was the point.

The Court: Let's just understand that that is the portion of it and the actual negotiations of it are not what we are talking about. It's the first several pages there.

Mr. Shapiro: Actually, I think—I was going to develop it through the witness but I believe it's pages 1 through 4.

The Court: Yes, sir.

Mr. Shapiro: Of this copy.

The Court: Yes, sir.

Mr. Shapiro: I've seen another copy which was different.

By Mr. Shapiro:

Q. Now, Mr. Cooke, was anything said at this conference by the company about having insufficient staff to have—to use their former procedures for keeping track of the  
548 negotiations? A. No, sir.

Q. What did the company say? A. Well, Mr. Wyckoff recalled two previous instances in which a Court



Reporter had been used, and neither of these meetings actually pertained to conferences with System Federation 69.

At one of the conferences to which he referred, the General Chairman of System Federation 69 was present at that meeting. That was in Mr. Ball's office herein Jacksonville.

Q. When was that? A. On a previous date. I don't recall the dates personally but—

Q. Would your recollection— A. He refers here to the two meetings of March 15 and May 10. It was one of those.

Q. And what did you respond to that? A. Well, I told Mr. Wyckoff that those were not conferences on initial wage notices or Section 6 notices.

Q. Why did you object to the presence of the Court Reporter? A. Well, we objected simply because it doesn't set up an atmosphere in which collective bargaining can be carried on. It makes everyone more—makes them try harder to make a perfect record, rather than to try  
549 to make progress in the negotiations.

Q. Did Mr. Wyckoff make any statement in this conference about the company's policy in the future concerning Court Reporters? A. Yes, sir. At the conclusion of our argument about the Court Reporter, he informed us that such sessions would be recorded by a Court Reporter from that date on.

Mr. Shapiro: I have no further questions of this witness.

The Court: Mr. Milledge?

Mr. Milledge: We have no questions, Your Honor.

The Court: Mr. Devaney?

#### Cross Examination

By Mr. Devaney:

Q. Mr. Cooke, when did you say the first meeting was that a Reporter was used that you attended? A. That was the meeting in Mr. Ball's office, either in March or May of 1963.

Q. I show you this. Does this refresh your recollection? This shows the meeting was held March 15. Does that appear to be the one you are referring to? (Indicating) A. Yes, sir, I believe this is; to my recollection, this is the first one that I attended that was recorded by a Court Reporter.

Mr. Devaney: Would you mark that, please.

The Clerk: U for identification.

The Court: Go ahead and mark it in evidence. Unless there is some objection you want to voice, we will let the Clerk go on and mark it in evidence now. This is represented to be the first one, Mr. Devaney, where a Reporter was used; is that right?

Mr. Devaney: The first one Mr. Cooke attended.

The Court: All right.

(Thereupon, the referenced document was received and filed in evidence as Defendants' Exhibit U.)

By Mr. Devaney:

Q. While he's looking at that, Mr. Howard, may I ask you this—I mean Mr. Cooke. I know you are not Mr. Howard I apologize.

You said that prior to 1963, you were not aware of  
551 a verbatim record being made; is that correct? A.

That is correct. I was not aware if one was being made.

Q. And your presence at the negotiations as General Chairman goes back to 1959? A. That is correct. November 1st, 1959.

Q. Were you—and what you say about not being aware would apply to the entire period from 1959 to '63? A. Yes, that's correct.

Q. In other words, you simply do not know whether anyone representing the company did or did not make a stenographic record of the meetings? A. No, sir. I'm not aware that any such record was being made at any meeting I attended.

Q. At various meetings, did you act as spokesman, Mr. Cooke? A. Yes, sir, at meetings where System Federation 69 was concerned, I usually acted as spokesman.

Q. Now, at such times, does this keep you pretty well occupied in doing the speaking and looking at your papers and other documents? A. Yes, sir, that's right.

Q. You don't have much occasion to look around to see what your opposite members are writing or whether  
552 they are not writing? A. Well, yes. I have looked around, Mr. Devaney, and I've seen them writing. I know that at least notes were being taken by various people, by both sides.

Q. Yes. But what I meant is, you don't have enough time to watch them to see whether they are missing words? A. No, sir. I do not, no, sir.

The Court: I think—I must say that it would be pretty hard in a conference room around a conference table and not know whether or not somebody is making verbatim notes. It's not like observing everything that goes on on a football field or out in the streets or something. A few people in the room; I don't see how—I understand that all he says is that he didn't see any. He might have been occupied with other things, but I think there's a conflict of testimony as to what occurred, is what it comes down to.

By Mr. Devaney:

Q. Now, do you—

The Court: I would say this for the record, something that hasn't come out; it may be in the record and may not be known to you, Mr. Devaney.

553 Mr. Sam Rosenfeld is a stenotype reporter. His taking notes of the proceeding might be a little more evident to everybody who would glance around than it would be to somebody sitting over there with a pad on the table in front of them. I say that because that may not be something that you are aware of.

Mr. Devaney: Thank you. No, I don't believe that was evidence on the record, Your Honor.

I don't believe I have any further questions of Mr. Cooke.

Mr. Shapiro: Mr. Devaney, may I have that exhibit you were examining? Do you want to use it?

Mr. Devaney: Yes. I'm sorry.

The Clerk: Let me mark it.

Mr. Devaney: This has been marked as U.

The Clerk: I didn't get it back to put it in evidence.  
(Marking instrument)

By Mr. Devaney:

554 Q. Do you wish to look at this further before I offer this as Defendants' Exhibit U, as being the transcript of the first meeting at which you attended where a Court Reporter was present? A. Yes, sir, I attended this meeting. I believe I testified that the other one was the first one in which System Federation 69 alone was involved in negotiations.

Q. I see. A. This was the entire group.

Q. This involved System Federation plus others? A. That's right, others.

Mr. Devaney: I offer this, Your Honor, as Defendants' Exhibit U.

The Clerk: It's in.

The Court: It's already received.

Mr. Devaney: Thank you.

No further questions.

Mr. Milledge: I think one more question ought to be asked, Your Honor.

555 The Court: All right.

Redirect Examination

By Mr. Milledge:

Q. The people on behalf of the carrier at these other negotiating sessions were all people actively participating in the negotiations; were they not?

In other words, did they ever have a person just sitting there, a lady or a man, doing no participating in the negotiation but just writing continuously? A. (No response)

Q. Did they ever have that situation? A. I've never observed anyone sitting and writing continuously, no.

Mr. Milledge: All right.

Mr. Shapiro: I have no further questions.

(Witness excused)

Mr. Shapiro: This concludes the rebuttal case for the Government, Your Honor.

The Court: Any surrebuttal?

556 Mr. Devaney: Yes, Your Honor. I would like to recall Mr. Wyckoff.

The Court: Come back.

**R. W. Wyckoff.**

having previously been sworn, was recalled as a witness on surrebuttal for the defendants and further testified as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. Wyckoff, when you first joined the Florida East Coast as a member of the negotiating group, were you the only person who could and did take shorthand minutes for the company? A. No, there were usually two others besides myself who were qualified to take shorthand notes.

Q. Who were these others, Mr. Wyckoff? A. One was a young man by the name of John Douglas, and the other was Mr. Frank Atkinson, who could also take shorthand notes.

Q. Could either or both of these individuals take shorthand fast enough to make a verbatim record? A. I personally know that Mr. Douglas could because he recorded

frequent investigations before he went to St. Augustine.

557 Q. What do you mean by "investigations"? A. Well, they are on the form of a trial. A man appears under charge. He brings his evidence or the railroad brings the evidence first as to the rule infraction. The individual under charge presents his evidence to attempt to to exonerate himself.

Q. And you say Mr. Douglas had made records of these investigations? A. Both Mr. Douglas and myself.

Q. And at these investigations, you made a verbatim report? A. That's correct.

Q. Now, in these negotiations in which Mr. Howard was present, did you ever have occasion to observe and see whether he was writing in shorthand, Mr. Wyckoff? A. Whether Mr. Howard was writing shorthand?

Q. Yes. A. No. Usually I was taking the notes myself and, on occasion, Mr. Douglas did also; but I never paid particular attention to what Mr. Howard was writing. I knew that he was making notes. That was the most I could say.

Q. Could you see what he was writing from where you were sitting? A. No, I couldn't. The office was 558 so arranged that Mr. Howard or the negotiator from the union sat directly opposite Mr. Beals, who negotiated for the railway. And to the left was a separate table at which four individuals from the carrier were seated, four and on occasions five.

Q. Now, did this arrangement continue all the way up to 1960? A. Yes, as long as Mr. Beals was there, that arrangement continued.

Q. What was the arrangement after 1960? A. There was a separation made of the personnel functions and Mr. Holman was made Director of Personnel. He moved in a separate office but somewhat the same procedure was followed.

Q. Did you sit opposite Mr. Howard or in front of Mr.

Howard? A. Well, I believe it was in November, 1960, I was made Assistant Director of Personnel and I sat usually immediately adjacent to Mr. Holman. Now, there were other people on the staff at that time who could take shorthand notes and did take shorthand notes.

Q. Now, where—Did Mr. Howard always sit opposite you, right directly across the table from you, Mr. Wyckoff?

A. You mean during the time Mr. Beals was negotiating?

Q. No, from 1960—after 1960? A. Well I sat off  
559 to the left a little more. He didn't sit directly opposite me, no.

Q. This was a table with nothing between you two? Could he see what or whether you were writing on all occasions? A. Prior to 1960, I don't see how he could have because we kept the working agreements on the forepart of the table and usually that was stacked maybe a foot and a half high, so we would have them all present regardless of what might come up. And the balance of the table, we utilized for writing purposes. So how he could have seen what was going on is beyond my comprehension.

The Court: Look, let me ask you something. Let's have it one way or the other:

Either, as I understood you to contend before, you were in there openly taking notes where everybody could know it; now you were surrounded by papers and sneaking, taking notes by stealth.

Now, which is it?

The Witness: Your Honor, it wasn't a matter of taking notes by stealth.

The Court: Let's have it one way or the other.

560 The Witness: It wasn't a question of taking notes by stealth. We sat right out in the open.

The Court: You just said he couldn't tell what you were doing because you had papers stacked up a foot and a half high.

Now, which is it?

The Witness: Your Honor, he could see us writing, but



whether he could see us writing continuously or not, I can't say. I don't see how he could.

The Court: I just want your final version of this now and then we'll go ahead to something else.

The Witness: Your Honor, I'm trying to give it—

The Court: All right.

The Witness: —as honestly as I know how. I transcribed—I recorded the notes verbatim. When I transcribed them, I gave a resume form.

By Mr. Devaney:

Q. Now, were there occasions when there was some  
561 comment made about the company representatives taking these notes in shorthand, Mr. Wyckoff? A. There was a request, as I said before, on one or two occasions to my knowledge that they be furnished with a copy of the transcript.

Q. This was before—we are not talking about a Court Reporter now? A. That's right.

Q. Was there any comment on any occasion to indicate that they were aware that you were taking these notes in shorthand?

Mr. Milledge: I object. This is hearsay, if nothing else.

The Court: Go ahead and let him answer.

The Witness: Well, I know that the representatives were familiar with the fact that we were taking the notes in shorthand because frequently the negotiator would refer to us and ask what was said. We wouldn't read it back necessarily but we would tell it in a short version of what had transpired. So I know they were familiar with the fact that notes were being taken.

By Mr. Devaney:

562 Q. And this—there were requests by union representatives of the individuals making notes to clarify what had been said previously; is that correct? A. Either union representatives or Mr. Beals, who was negotiating for the railroad.



Q. Now, does Mr. Howard, or has Mr. Howard since 1954 occupied the same position at the table with respect to you on every negotiating session? A. Up to 1960, to the best of my recollection, yes.

Q. In other words, he always took a sort of pre-assigned position and you took a pre-assigned position? A. That's correct.

Mr. Wyckoff, I hand you this and ask you if this is a copy of the transcript made of the meeting you previously referred to between the company and various international union officials? A. Yes, it is; on July 24, 1963.

Mr. Devaney: I ask that this be marked as—  
The Clerk: V.

(The referenced document was marked Defendants' Identification Exhibit V.)

(Mr. Devaney tendering instrument to Mr. Shapiro)

563 By Mr. Devaney:

Q. Mr. Wyckoff, are the investigations that you referred to earlier, are these the sort of cases that go to the Adjustment Board? A. Yes, they are quite frequently.

Q. And as I recall, you said that you did keep minutes of those meetings also? A. They are recorded and transcribed verbatim.

Q. And the transcription is verbatim as well as the taking of the notes? A. That's correct.

Q. Are those transcripts made available to the union? A. In the event the man under charge is disciplined, he is furnished with a copy of it.

Q. The individual? A. That's correct.

Q. What is the physical set-up, Mr. Wyckoff—

The Court: This you are talking about is making a record of his trial?

The Witness: That's correct.

The Court: For violation of rules or whatever it is?

564 The Witness: That's right.

The Court: The discipline hearing.

By Mr. Devaney:

Q. Now, what is the physical set-up at these hearings? Where are they held ordinarily? A. They are held—

Mr. Milledge: Excuse me. I object.

The Court: I suppose these people will concede that they make stenographic records of these disciplinary hearings and trials. It has nothing to do with this.

Let's move on.

Is that correct? Do you stipulate this?

Mr. Milledge: Yes. Yes, often with tape recorders and various devices.

Mr. Shapiro: The Government has no knowledge, Your Honor.

The Court: Sir?

565 Mr. Shapiro: The Government has no knowledge.

The Court: Well, I would suppose, just as a matter of common sense, I would guess they would.

Mr. Shapiro: I would expect so.

The Court: If he is fined or going to lose his job, they make a transcript of it. There may be an appeal. The same reason we are making a record in this proceeding.

Mr. Devaney: I offer this as Defendants' Exhibit—

The Court: It has nothing, I can see, to do with whether you have a Reporter present when you are negotiating rules, rates of pay and working conditions.

Mr. Devaney: Your Honor, it does not have any relationship as to whether we do or do not except in a physical sense, and as to who makes the same record, where the same individuals are used for both purposes. It was merely my purpose to show that the same physical conditions by and large existed at these meetings that existed in the negotiations.

566 Mr. Milledge: Of course, we can't stipulate to that.

The Court: No, I understand.

Mr. Devaney: It has been objected to and I haven't pursued it, Your Honor.

The last point is the offer of the document marked as Defendants' Exhibit V.

The Court: What it is?

The Clerk: V.

The Court: Let me see it.

(Clerk tendering instrument to the Court)

The Court: Tell me what it is you want me to take note of in here? This is about a hundred or more pages of reading material.

Mr. Devaney: Yes, this is the meeting that Mr. Wyckoff testified to between the company and the officials of the various international unions. It shows, Your Honor, that—

567 The Court: Well, is it mainly to show that there was a Reporter present and a transcript was made, or do you want me to take note of something said?

Mr. Devaney: That the Reporter was present, that these international officials did express an objection, but then proceeded with the meeting. That is the primary purpose of all the transcripts; I don't see that any of them have any other purpose than that.

Mr. Shapiro: Your Honor—

Mr. Milledge: We will stipulate to that.

Mr. Shapiro: Your Honor, if the exhibit is to be received, I think it's important that the objection by the union representatives and the entire discussion of whether or not there should be a Reporter should be specifically noted.

Now, I haven't had a chance to examine it fully but I think it runs from about page 1 through 10.

568 The Court: Well, I'll read those pages. If I'm expected to read everything in a hundred-page transcript, why, I would like to know it. Mark it in evidence, please.

(Thereupon, Defendants' Identification Exhibit V was received and filed in evidence.)

## Cross Examination

By Mr. Milledge:

Q. Mr. Wyckoff, it's fair to say that if you had such a transcript of a negotiating session before 1963, that you would have brought it today; isn't that a fair assumption?

A. No, it isn't necessarily a fair assumption.

Q. Well— A. There may be—

Q. There aren't any, are there? A. Sir?

Q. There aren't any, are there? Any transcriptions of any negotiating sessions prior to 1963? A. Now, I assume you have reference to my notes, my shorthand notes; is that correct?

Q. I have reference to a transcript. There aren't any transcripts, are there? A. There are resumes of what transpired during the course of the negotiating sessions, and there may be some of my shorthand notes in the file. I'm not in position to say now without reviewing the files.

569 You didn't bring any of your shorthand notes of these verbatim things either, did you? A. I don't have them with me, no.

Q. No; all right.

Mr. Shapiro: No further questions.

Mr. Devaney: Nothing further, Your Honor.

The Court: Come down.

(Witness excused)

The Court: Do you have any further evidence to offer?

Mr. Devaney: I'm sorry. We have no further evidence, Your Honor.

The Court: Both sides now announced closed?

Mr. Shapiro: Now closed, Your Honor.

Mr. Milledge: Yes, sir.

570 The Court: About how long do you gentlemen expect to take in the argument of this matter?

Mr. Shapiro: I think, Your Honor, that the Gov-

ernment should be able to present its main contentions in a half-hour, or perhaps less.

The Court: How long would you want, Mr. Devaney?

Mr. Devaney: Well, we will accomodate ourselves to whatever the Court feels is a reasonable time, Your Honor. We will try to be as brief in any event as possible. I would think that—

The Court: Something in the order of a half-hour?

Mr. Devaney: If the plaintiff wants thirty minutes, I would say we would limit—

The Court: I haven't asked Mr. Milledge and Mr. Rutledge. They may want some time, along with Mr. Shapiro's opening argument or in reply. They are here and they want to be heard.

Mr. Milledge: I think probably ten minutes, but  
571 I think, at the outside, fifteen, probably ten.

The Court: Well, we have been in here since 9:30. Maybe you gentlemen would like to take about five or ten minutes rest.

We might be more comfortable if we took a brief rest-break at this point and be prepared to proceed in about ten minutes after the hour. That's seven or eight minutes.

(Short recess)

The Court: One suggestion I make is what you not spend too much time initially at least on the jurisdictional question, major v. minor disputes question, except to the extent that you think it may differ from the Trainmen case, in which I went through this matter a couple months ago.

Mr. Shapiro: Yes, Your Honor.

The Court: You may have to reply extensively on this point but I think, as far as the argument would parallel the argument in the Trainmen case, I think I have that  
572 pretty clearly in mind as to the ground on which you would urge that there is jurisdiction and that it is a major as opposed to a minor dispute. That may save some time.

I have some tentative—I have necessarily reached some tentative conclusions about that, which may speed up your presentation of it. Mr. Devaney may raise some other questions in his argument that would require you to answer him on that point, but you just hit that quickly and lightly, I would think.

### **Argument by Mr. Shapiro**

Mr. Shapiro: I can hit that very quickly and lightly, Your Honor, because it has been demonstrated by the answer and by the evidence in this record that the carrier at present is not operating under its so-called “Conditions of Employment.” It’s operating under the “Uniform Working Agreement” of September 24, 1963, and under the basic bargaining agreements for the operating crafts and classes, as amended by the notices of November 2nd, 1959.

The “Conditions of Employment” become relevant here primarily as a matter of the scope of relief in the  
 573 event relief is granted, because the carrier has indicated quite plainly in the testimony that if it is enjoined from operating under the “Uniform Working Agreement” or under the operating agreements as amended by the November 2nd, 1959 notice, it will simply go back to the “Conditions of Employment”. So it’s a question of how it relates to the scope of relief, but the immediate issues here are really confined to the Section 6 notices proposing abolition of the union shop and proposing the “Uniform Working Agreement”. Those are very plainly major disputes.

Now, I don’t think we have to dwell too long on what has been admitted in the complaint and answer; that July 31, 1963, the union shop agreements for the seventeen organizations listed in the complaint were proposed for cancellation; that meetings took place; that bargaining broke down over the Court Reporter issue; that the services of the Mediation Board were invoked within ten days after the last conference broke up on August 29, 1963; and that on September 9, 1963, the carrier, at the very outset of the

invocation of the Board's jurisdiction, announced that it considered the agreements to be cancelled; that it  
 574 refused to restore the status quo and that it informed the National Mediation Board in effect that it did not have any jurisdiction because the labor organizations were not in any position to invoke the Board's services.

Although the Board offered mediation by its letter of—I believe—well, by letter in October, the carrier replied on October 15 that it considered the agreements to be cancelled.

It has also been established that, as far as we can tell on the record now, the cancellation of the union shop agreement does not appear to apply to one organization, the American Train Dispatchers.

The carrier's position on the union shop matter is that there is nothing left to mediate; that, as its letter of October 15, 1963, indicates, Exhibit 9 to Mr. Thompson's affidavit, the only way that the union shop matter can be raised again is by a new Section 6 notice.

Now, with respect to the September 24, 1963 "Uniform Working Agreement", we have a similar history. The agreement was proposed. The parties met on October

28. I'm sorry, I think they met a little earlier than  
 575 that but, at any rate, the agreement was put into effect notwithstanding the fact that there had been a timely invocation of the Board's services; and the carrier again insisted that the Mediation Board was without jurisdiction. In fact, the answer which has been filed here has as one of its defenses that the Mediation Board has no jurisdiction in the circumstances.

I've already said that the September 24 notices are what the carrier states to be in effect now.

Now, we have had a great deal of trouble with these words "in effect", but at this point, it seems to be fairly plain that, whatever the carrier means by "in effect", whether it means what it's actually operating under or whether it means what's on a piece of paper but dormant,



the September 24 "Uniform Working Agreement" is in effect for the non-operating organizations and for the International Association of Railway Employees.

For the operating organizations, it's the basic agreements as amended by the November 2nd, 1949, notices by the ops.

Since the testimony is that the carrier would revert to the "Conditions of Employment" and since the testimony has also shown that the "Conditions of Employment" of September 1, 1963, are substantially the same as the "Uniform Working Agreement", the "Conditions of Employment" become relevant to the case insofar as we are concerned with the scope of the decree.

If the carrier is required to restore the status quo, it would simply go back to these—as I've already said, to these "Conditions of Employment", thereby achieving indirectly what it cannot achieve directly through a Section 6 notice, since it's already established that the conditions are substantially the same as the "Uniform Working Agreement", with a few differences relatively minor in nature as far as the actual rates of pay, rules and working conditions—the real heart conditions, pay, seniority, hours of work, holidays and the like. The things that form the heart of the collective bargaining agreements are the same as the "Conditions of Employment" and the same in the "Uniform Working Agreement".

Now, this carrier has never attempted, we believe, and the evidence we believe will show this, to comply with the requirements of Section 6 of the Railway Labor Act and Section 2, Seventh of the Act, insofar as its "Conditions of Employment" are concerned. It has used these "Conditions of Employment" as a means of evading the requirements of the Act and, indeed, evading the requirements of Public Law 88-108 and evading the ruling by Judge Youngdahl in April of last year in the Section 10 case which was brought against the carrier. Each time it has been told to do something to restore the



status quo, the only thing that has happened is that it has gone back to these "Conditions of Employment". In fact, it's plain that the only thing it ever did operate under were the "Conditions of Employment" and this was the situation until it finally put into effect the "Uniform Working Agreement"; and finally after a great deal of hemming and hawing, decided that it preferred the December 2nd, 1959 arrangement for its operating organizations to its former proposal of September 25, 1963.

Your Honor will recall that that September 25, '63 notice was served on the operating organizations and that it's nothing more than the "Conditions of Employment" transformed into permanent agreement for the operating organizations.

578 The carrier abandoned that proposal and it seems to have done so categorically on March 9, 1963, after Your Honor's decision in *Brotherhood of Railway Trainmen v. the Florida East Coast Railway Company*.

At one time, this carrier actually seemed to have in effect two sets of rates of pay, rules and working conditions for its operating employees.

On February 25, 1963, you will recall from Mr. Wyckoff's testimony that they had written a letter informing the carrier that—informing the labor organizations that the September 25 notice was in effect, except as modified by Your Honor's decree in No. 260; that the November 2nd, 1959 notices were in effect. And apparently the carrier was at that time working under the "Conditions of Employment".

What we have here is a proclivity to twist and turn back and forth among the several possibilities that the carrier set up for itself in an effort to avoid the requirements of the Railway Labor Act and to shake itself free from the collective bargaining agreements, which it finds unsatisfactory.

579 Now, the carrier, I think the evidence will show, cannot be justified in its contention that all it has done was put upon it by the strike in January 1963.

This carrier never attempted to comply with the bargaining agreements that it had. It never initiated a program intended to bring it into capability of complying with those bargaining agreements.

Mr. Thornton testified that it began a long-range permanent program in February, 1963, to build up its personnel staff when it resumed operation. And this long-range program was really based on what became the "Conditions of Employment".

Now, the program was aimed at getting rid of the rates of pay, rules and working conditions that the carrier considered undesirable from the standpoint of its operation.

There's nothing wrong with trying to improve operations and increase efficiency, but there is something wrong with doing it in a manner not provided in the Act.

The rules for conducting labor affairs in the railroad industry are laid down by law and are laid down by law in an effort to minimize controversies. This carrier is not interested in that law.

580 Now, what are the violations?

Well, it's nothing more than Section 6 of the Railway Labor Act, which provides that the status quo will be maintained while mediation effort is being made on notices served thereunder; and Section 2, Seventh of the Railway Labor Act, which forbids the carrier to change rates of pay, rules and working conditions as embodied in agreements, except in accordance with the procedures of Section 6.

The carrier suggests that it has a right to resort to self-help with respect to the union shop agreements and with respect to the "Uniform Working Agreement", because the conferences broke down.

I think this flies in the face of the express language of the Railway Labor Act. Section 2, Fifth of the Act expressly provides that where conferences are refused, the Mediation Board may put itself in touch with the parties and that thereafter they will follow the procedure of Section 6.

I refer specifically to—it would be 45 U.S.C. 15—

The Court: 2, Fifth?

581 Mr. Shapiro: 2, Third.

The Court: 2, Fifth, isn't it?

Mr. Shapiro: 2, Fifth, yes, Your Honor. Did I say 2, Fifth? I should have said—

The Court: 2, Third.

Mr. Shapiro: I should have said it's Section 155.

The Court: 155, Third; is that right?

Mr. Shapiro: Yes. Your Honor, it's actually Section 155, First (b), and I apologize to Your Honor for the delay.

The actual language is that the parties, or either party to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases; and (b) provides:

582 “Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conferences between the parties or where conferences are refused.”

And it's that last phrase, that last five-word phrase, which demonstrates the inadequacy of the suggestion, that simply by getting into a dispute over how negotiations are going to be conducted, a carrier can resort to self-help without concerning himself with mediation and the Mediation Board's functions.

The whole purpose of the Mediation Board is to get together between parties who won't get together and to bring them by some means or other into negotiations where they can work something out. This is done by a dozen different techniques, as I think I mentioned yesterday; dealing with the parties separately, dealing with them jointly, trying to bring them to an agreement.

Now, this is very plainly a major dispute, as far as the Section 6 notices are concerned, so I won't ever discuss the major-minor aspect of it.

There's clear power under the Railway Labor Act for

this Court to vindicate the processes of the Act. The

United States very plainly has standing in a case  
583 where it's necessary that the functions of the Media-  
tion Board be protected, to come in and make it  
possible for the Board to carry out its statutory duty.

This was done by Judge Youngdahl in a case under  
Section 10.

It's a clear implication of cases like *In re Debs*, which we  
cited in our memorandum, in which a major strike was  
actually enjoined at suit of the United States. Note, the  
United States was not the employer or party to the strike,  
the major railway strike.

And I think it's made clear by the case which we cited  
in our memorandum concerning the City of Jackson and  
its refusal to comply with the Interstate Commerce Act. It  
was *United States v. City of Jackson*, 318 F. (2d) 1, with  
particular reference to the language at pages 11 through  
16, decided by the Fifth Circuit in 1963, and rehearing  
denied at 320 F. (2nd) 870.

I might say that in that case the Judges of the Court of  
Appeals based the standing of the United States on dif-  
ferent grounds. One ground was statutory but one of the

Judges wrote an extensive opinion demonstrating  
584 why the United States would have standing apart  
from the statute, and it's as to that to which we refer.

Now, the Norris-LaGuardia Act has been raised as an  
obstacle here. I think, in the light of Your Honor's de-  
cision in the Trainmen case, a serious contention that the  
Norris-LaGuardia Act is an obstacle cannot be raised in  
this case. This is very plainly a major dispute in which the  
carrier is charged with not comply with the requirements  
of the Railway Labor Act.

It has been established since *Virginia Railway v. System  
Federation*, 300 U.S., that where a carrier is charged with  
violating the Railway Labor Act, the Norris-LaGuardia Act  
is not a bar to jurisdiction. This is most clearly demon-  
strated in the decision of the Supreme Court in *United*

States—I'm sorry in *Trainmen v. Chicago R&IR Company*, at 353 U.S. 30. This is usually known as the Chicago River case and it is the decision in which the Supreme Court demonstrated how the Norris-LaGuardia Act must be accommodated to the requirements of the Railway Labor Act. The opinion, at pages 40 through 42, makes this particularly clear.

585 Now, that case involved a minor dispute, a strike over a grievance, which the Supreme Court said had to be processed through the National Railway Adjustment Board. Well, a fortiori, if you have to go to the National Railway Adjustment Board and exhaust those procedures before you can resort to self-help, then it would seem to follow that in a major dispute such as this "Uniform Working Agreement" dispute or the union shop dispute, that the carrier cannot resort to self-help until after the processes of Section 6 are exhausted.

Now, I think this is most clearly demonstrated in *Order of Railway Telegraphers*, at 362 U.S. Now, the correct citation of that, I'm informed, is 362, 330.

Now, that case involved a proposal by carrier to make changes in the number of stations that it was operating. And the carrier said that this is not a matter that is subject to the Railway Labor Act and we are not going to negotiate about it. And the union claimed that they had to negotiate about it, and threatened to go out on strike. Now, the matter reached the Supreme Court after the

Lower Court—

586 The Court: What was the defendant railroad, the Chicago Northwestern or Chicago Milwaukee? Which one?

Mr. Shapiro: Chicago Northwestern.

The Court: Chicago Northwestern.

Mr. Shapiro: The case reached the Supreme Court after a Lower Court had enjoined the strike, but only enjoined it pendente lite, holding on the merits that it had no jurisdiction.

The Court of Appeals in that case said that the Lower Court had jurisdiction and should enjoin the strike permanently.

The Supreme Court said:

"No, this is a major dispute and the Norris-LaGuardia Act bars an injunction."

Now, that was the majority opinion.

I went through the whole opinion and read Justice Whitaker's dissent. As it happened in that case, Justice

Whitaker's dissent lays out all of the facts and Justice Black's majority opinion simply lays out the  
587 general conclusions that the Court had reached. In there, I found that in the case mediation had been invoked. The National Mediation Board's services had been called upon, the Board stepped in and it made a mediation effort. It actually lasted, oh, about five months. It was about five months of mediatory effort, if you take the time from the time the Board's jurisdiction was invoked until the Board finally gave up and proffered arbitration to the parties in June of 1960. And it was then, at that time, that the union went out on strike.

The point again—the point of the Railway Telegraphers case is that Norris-LaGuardia Act—the Norris-LaGuardia Act does not apply prior to the time that the processes of the Railway Labor Act are exhausted; or, turning the coin the other way, I stated it as we view it, but, turning the coin in terms of the exact hearing and holding of the case, after the processes of the Railway Labor Act are exhausted, the Norris-LaGuardia Act will bar an injunction against self-help; but after the processes of the Railway Labor Act are exhausted.

Now, the particular facts that I refer to appear in  
588 Justice Whitaker's dissent, at pages 349 through 350.

I don't think that the Norris-LaGuardia Act can stand as an obstacle in this case.

The further defense is raised that the National Mediation Board has failed to mediate in the circumstances, but, as I have stated to Your Honor, this is a case in which at the very outset of the dispute over the union shop agreement, over the "Uniform Working Agreement", at the very outset of the time when the National Mediation Board is taking jurisdiction of the case, the carrier is putting those very changes into effect; and by doing this it is defeating the conditions of stability which Congress provided for when it required that there be a maintenance of the status quo while the Mediation Board makes its effort.

Now, because the carrier has done this, the Mediation Board is not obliged to go ahead and mediate until the carrier gets back into compliance with the Act. That's the purpose of this action.

There have been other defenses raised. One is that the labor organizations have disclaimed their representative status. Now, I am a little puzzled by this since I  
589 know of nothing in this record to support the statement that these labor organizations have disclaimed their representative status. Under the Railway Labor Act, they represent all of the craft or class, whether the crafts or classes are members—whether the employees in the craft or class are members of the union or not.

Now, these labor organizations have a union shop agreement and that union shop agreement remains in force notwithstanding the fact that there is a strike going on.

There was some argument yesterday which indicated it was the carrier's position that the union shop agreement just became—was cancelled by itself, but the purpose of this action is to compel the carrier to withdraw its own cancellation of that union shop agreement.

Part of the carrier's argument here appears to be that because the union is on strike or because the organizations that are not on strike have members who do not cross the picket lines of those who are on strike, that the union shop agreement becomes somehow nullified. The consequence



of this would be, of course, that every time there was a strike by an organization with a union shop agreement over any issue, the union shop agreement would be cancelled.

Now, this is just absurd. The union shop agreement survives until it's cancelled in accordance with the processes of the Act. How the parties work under the agreement may be something else again, but the agreement survives and the cancellation which has been attempted here as a prospective matter is illegal and should be enjoined.

We've already mentioned the National Railroad Adjustment Board problem, pointing out that this is basically a major dispute; but if the carrier reverts to the "Conditions of Employment", it is going to be simply trying to put into effect indirectly what it cannot put into effect without complying with the procedures of Section 6 of the Railway Labor Act; in short, using the "Conditions of Employment" to evade the requirements of Section 6.

Now, there has been some reference recently to the very recent decision of the Court of Appeals in *Aaxico Airlines, Inc. v. Air Line Pilots Association*.

The Court: *Aaxico Airlines*, isn't it?

591 Mr. Shapiro: Yes, sir, decided, I think, April 15th.

Well, Your Honor, the *Aaxico* case, I don't think has any application to this case. In the first place, in *Aaxico*, we didn't have an attempt to implement through Section 6 notices the same conditions that have been raised here as temporary "Conditions of Employment".

Secondly, in *Aaxico*, at least it could be argued that the question of whether or not the contract survived under its terms or the contract involved, the question of whether or not the contract survived arguably could be said to depend upon the particular language of that contract. But in this case, the carrier has told us that its "Conditions of Employment" have no effect on the contract. So that what it's really saying is that it's the Railway Labor Act that



gives it some special right to evade, avoid the rates of pay, rules and working conditions as embodied in that contract and substitute on a wholesale basis a complete revision of the rates of pay, rules and working conditions for the duration of the strike emergency.

Now, it isn't the contract that's in issue. Its the  
592 statute. And that is certainly not a question of the National Railroad Adjustment Board.

I should mention also the decision of the Second Circuit in *Manning v. American Airlines*, which also involved an attempt by a carrier to change rates of pay, rules and working conditions without going through the processes of the Act. In that case, it was a check-off arrangement which the carrier unilaterally terminated. The Second Circuit said this was very plainly a matter which belonged under Section 6, it was a major dispute, and it affirmed an injunction notwithstanding the carrier's argument that it was a minor dispute and that the Norris-LaGuardia Act somehow barred jurisdiction. Now—

The Court: Do you have the cite of Manning?

Mr. Shapiro: 329 F.(2nd) 32.

The Court: Thank you. I assume it's in your brief?

Mr. Shapiro: It's in our brief, but I think in our brief  
593 it's still cited to the Labor Relations Reference Manual. It was only reported a few weeks ago under the Federal (2nd).

Now, there's one final statement I would like to make in response to a representation made by Mr. Devaney during an altercation over the admission of some evidence.

Mr. Devaney stated that, in the case last December involving Public Law 88-108, he had told me about the "Conditions of Employment" and that if I didn't ask Mr. Wyckoff further questions about them, it was not Mr. Wyckoff's fault. I have no recollection of having been told about the "Conditions of Employment" by Mr. Devaney. I know that there is nothing in the record in No. 260 about them and I'm also prepared

to represent to the Court that the first information we had in the Department of Justice about the "Conditions of Employment" of September 1, 1963, was after Your Honor's decision in the Trainmen case on March 2nd. It was that information which led to a general view of the problems of the Florida East Coast Railroad and Ultimately to the direction that this action be filed.

There is a final matter. A good part of the rebuttal case by the carrier and part of our case this morning was  
594 addressed to the question of Court Reporters in labor negotiations. Now, I think Your Honor will recall that I had objected on the ground, at the time this issue came up, I had objected on the ground that I didn't consider it relevant or material to the case.

I want to reiterate that I haven't abandoned that position, that I wanted to present evidence to rebut it in case my contention here, which I'm about to make, is rejected.

Now, the relief we seek here is primarily to compel the carrier to restore the status quo ante its notices involving the union shop agreement and the "Uniform Working Agreement", and to prevent it from avoiding a direction that it do this by resorting to the "Conditions of Employment" of September 1, 1963.

We also ask as a general prayer that the carrier be directed to bargain in good faith. The theory that the carrier has not bargained in good faith is based on the fact that the carrier put its rates of pay, rules and working conditions into effect without waiting for the processes of  
the Act, without trying to make an effort to comply  
595 with the processes of the Act. That is the real violation.

Now, I think we developed in the testimony this morning that one could say that the labor organizations refused to bargain in the presence of the Court Reporter, or one could turn it around and say that the carrier refused to bargain in the absence of a Court Reporter. Court Reporters aren't customary in labor negotiations, for the reasons

that Your Honor has heard this morning. They inject an awareness of words, a concern with formality. It defeats the whole effort of trying to reach agreement.

Again, I emphasize that in labor negotiations, you've got strong-willed people on both sides taking a strong position and sometimes using strong language. They have to work in an atmosphere of informality. Now, the fact that someone has a reporter present doesn't automatically make their insistence on the reporter a violation of the law. This is largely a matter of circumstances. But in most circumstances it may well be evidence of bad faith, as the National Labor Relations Board has held. It isn't of itself a violation, but it may be evidence of an intent or an attitude to bring about a violation.

596 Now, no decree that Your Honor has to issue at this time need be directed to this issue of whether a reporter should be present or not. It is conceivable that further difficulties could arise over this Court Reporter issue but it would be hoped that, with an honest mediation effort and genuine, sincere effort on both sides to comply with their statutory duty to exert every effort to reach agreement, that this could be avoided because the Court Reporter, after all, is only a matter of procedure and labor negotiations can be carried on effectively without one.

If everybody does meet and try to do what the statute says they must do, and the express words are, in Section 2, Second, I believe it is—152 Second—that they exert every reasonable effort to make and maintain agreements. I'm sorry, that was Section 2, First.

Section 2, Second is that all disputes shall be considered and, if possible, decided in conference.

Those two Sections, taken together, state the duty to bargain in good faith, to really try, to meet together  
597 at reasonable times with an intent of making every effort to reach agreement.

Now, that's as much as is being asked for here, to give

the Mediation Board a chance to try and work with these people. I don't know whether they will succeed.

It may well be that at the end of all of this, the carrier may well end up with the right to put its "Uniform Working Agreement" into effect.

The Government's interest here is not in what is proposed by the carrier or what is proposed by the union, as such. The Government is concerned with bringing the parties together so that they can try and reach an agreement. What kind of agreement they reach is for them to decide. That's as far as the Railway Labor Act takes the Mediation Board, or takes the Government in these disputes. And what we ask is that the carrier be required to restore the conditions under which mediation can take place and that the processes of the Railway Labor Act be applied to it.

The Court: Do you want to go ahead now?

598 Mr. Rutledge: Your Honor, would it be appropriate for us to reserve just a few minutes at the conclusion?

The Court: I think so, if that's agreeable with Mr. Devaney.

Mr. Devaney: You mean that they be in the rebuttal position, Your Honor?

The Court: Well, I think— suppose, if you differ in any particular from the Government's view, you go ahead and state it now so that—

Mr. Rutledge: We don't differ with anything that the Government's view, either as to the law or the facts in this case.

Argument by Mr. Devaney:

Mr. Devaney: Your Honor, to begin with, I would like to reiterate at the outset our Motion to Stay any decision in this case pending the decision of the Fifth Circuit in the 21356 case. And as we set forth in the Motion to Stay the entire proceeding, the same issues are involved and we feel

for those reasons that for the Court to issue here a  
 599 temporary restraining order is actually within the  
 terms of the order issued by the Court of Appeals on  
 March 14th, staying the proceeding, namely, that any order  
 such as is requested here—and Mr. Shapiro says what he  
 really wants is an order requiring that we may operate dur-  
 ing the period of the strike only under the terms of the  
 agreement that was in effect before the strike began—and,  
 as the testimony shows very clearly, this can have only one  
 effect on the operation of the Florida East Coast and that  
 is in reduction of its service.

Now, a 50% reduction in service would be felt not only  
 by the railroad but by the public that we serve. And this  
 issue having been present, the same issue of irreparable  
 harm having been present in the 64-40 case, and the Court  
 of Appeals having granted this stay pending its decision in  
 21356, we again urge that that should be considered in this  
 case.

Now, before reaching the actual facts in this case, I  
 would like to direct attention, first, to some portions of  
 our memorandum in support of our Motion to Dismiss that  
 relate to the standing of the Government to maintain this  
 action at all.

600 I think that the complaint and the testimony here  
 makes it very clear that the real dispute is between  
 the various organizations and the company.

Now, in this regard, while there may well be disagree-  
 ment as to who struck John, I don't think there's any doubt  
 that the unions refused to bargain. All the testimony in-  
 dicates this flat refusal to meet. We say this is a flat vio-  
 lation of the obligation under the Act to meet and confer.

We believe that the various cases, beginning with the  
*Virginia Railway v. System Federation* through *Burley*,  
 and the most recent one is *IAM v. Central Airlines*,  
 all recognize that the duty to bargain is an actual duty  
 and it is not a perfunctory duty that either party can  
 simply close the door and say, "We won't bargain." The

Act never contemplated that. And for the union in effect to say, "We won't bargain, we won't play", just is not compliance with their obligation under the Act. So that this is a dispute between the Florida East Coast and the unions.

It's not a question of Florida East Coast having tried to evade the provisions of the Act at all.

601 Now, the complaint seems to be based on the assertion that the United States has standing because of some involvement with commerce, and yet the facts all indicate here, and I don't believe any contrary finding is possible, that there is no present interruption to commerce or any threatened interruption to commerce. Quite the contrary. Florida East Coast is operating. So that reliance upon this interruption to commerce is not well taken.

Now, by the same token, the United States has no proprietary interest in this case.

Now, they have cited in connection with the disruption of interstate commerce *In re Debs*. Now, that is to be found at 158 U.S. 564. It was decided in 1895.

Now, there is a later case which they cite, *United States v. Brotherhood of Railroad Trainmen*, 96 F. Supp. 428, Northern District of Illinois, in 1951.

Now, the basic holding in *In re Debs*, I believe has been squarely overruled by the Supreme Court and has certainly been overcome by the passage of the Norris-La-Guardia Act of 1932.

602 In *United States v. United Mine Workers of America*, which is at 330 U.S. 258, at pages 277 through 278, the Supreme Court had this to say:

"In the debates in both Houses of Congress, numerous references were made to previous instances in which the United States had resorted to the injunctive process in labor disputes between private employers and private employees where some public interest was thought to be involved. These instances were offered as illustra-

tions of the abuses flowing from the use of injunctions in labor disputes and the desirability of placing a limitation thereon. The frequency of these references and the attention directed to their subject matter are compelling circumstances. We agree that they indicate that Congress in passing the Act did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes."

Now, the case of the *City of Jackson* is itself an  
 603 unusual case and represented a very broad holding that the commerce clause prohibits obstruction to interstate commerce and that the United States has standing to sue for injunctive relief to enforce the Commerce clauses.

Now, here there isn't any possible allegation of the interruption of interstate commerce. And even though the City of Jackson was not based upon any threat or peril to interstate commerce but a finding that a present obstruction of interstate commerce existed, the contention that this can be further broadened here to say that the United States has standing under the commerce clause in any case by merely alleging that there may at some time be some relation to commerce does not seem well taken to me.

Now, in the second place, we pointed out that the United States is not the true party at interest. We think that this was demonstrated by the petition of intervention on behalf of the eleven unions; and that, because the United States was not the real party of interest, that it had no standing to maintain this case.

Now, all of these matters are reviewed at some  
 604 length in the memorandum in support of our Motion to Dismiss. And I'm not going to pursue them in great detail at this time.

Now, reverting to the complaint a moment, the complaint here is actually divided into three counts, the first one being the essential allegation appearing in paragraph 11, that the Florida East Coast breached its duty by failing



to make every reasonable effort to make and maintain agreements.

Now, this has no basis whatever in this record.

Now, a lot of remarks have been made as to the company's intention as to what was placed into effect and what was modified. We've never made any secret of our position. When the strike occurred on the Florida East Coast, the testimony here very clearly indicates there were no employees, no scope employees, left to perform the work. The only people available were the supervisory employees.

Now, when we resumed operations on February the 3rd, there wasn't any possible doubt that when we used these supervisory employees that we did so in violation, if you will, of the collective bargaining agreements. And when we operated the crews from Jacksonville to Miami and

back and when the same crew did the switching,  
605 the road work and the terminal switching at its destination, there isn't any doubt that this was not in conformance with the prior agreements. The agreements narrowly restricted the work to very strict craft lines. We did not have the employees to observe those craft lines. And it's perfectly clear that from February 3rd, we had no choice if we were to operate at all but to use the employees who were available in whatever manner necessary to perform this work.

We have said consistently that by doing this we did not change any agreement that existed before the strike.

Now, why the difference? Is there any difference between this? We believe that there is a very important difference between saying that we have changed those agreements and saying that we were forced to operate during the period of the strike with the manpower we had, even though it meant deviating from those agreements.

We say, as we developed before Your Honor before at some length, that the strike itself created this emergency condition and it had the effect of suspending the agreements.

606 Now, Mr. Shapiro says that we have alleged that it cancelled the agreements. We have never made



any such allegation. We do not believe that that was the effect at all. And the fact that we gave Section 6 notices later is certainly moot testimony that we did not take any such position at any time.

We do say that the strike condition permitted us to operate in the manner that we could with the personnel we had available.

We also say that this is not an instance in which the carrier sought to change or to bring about any change in the agreements.

Now, this is not a new idea. It was considered at some length by the Seventh Circuit Court of Appeals in the *Chicago Midlands* case. And that was the case in which there was also a strike by the Brotherhood of Railroad Trainmen, and the contention was that when the carrier itself took action that it was seeking to change conditions. The Seventh Circuit said, if I may quote briefly, it said this, and I'm quoting from 315 F. (2d) 771, and it is at page 775. The Court said:

607     "But defendants overlooked the fact that it was they who acted to disturb the status quo by inducing concerted action by plaintiff's employees to honor the picket lines, thus defendants' reliance upon *Rutland Railway Corporation v. Brotherhood of Locomotive Engineers* is misplaced. In *Rutland*, the railroad altered the status quo by reducing and rescheduling freight runs so as to eliminate the number of jobs and changed home terminals of some of the trainmen whose jobs were not eliminated. In *Rutland* the disagreement was characterized as being whether the railroad has the unilateral right to make those changes without negotiating about them with the Brotherhoods. It was the failure of the railroad taking such action to first confer with the Brotherhoods, which the Court there found required the application of the clean-hands provision of the Norris-LaGuardia

Act. In the instant case, the defendants unilaterally  
608 induced concerted action resulting in a work stop-  
page.”

Now, this merely emphasizes the difference between a carrier which, like Southern in the *Southern Railway* case or the like the Airline in the *Manning* case—if you would like the citations, I believe I have the Southern; do you have that, Your Honor?

The Court: I have that and I have the Manning case.

Mr. Devaney: Now, in the Southern case, as Your Honor will recall, this was an instance where the railroad undertook to change the long-established practice of having a fireman on every train. They contended that the existing agreement didn't require the hiring of additional firemen. They merely assigned firemen from their firemen roster until all the names were exhausted and then they didn't have to have any more firemen.

Now, that clearly was a case where the carrier sought to change. They were not faced with any action by the union that changed the status quo which gave them the right to react to it.

Manning was the same kind of case. That was the  
609 case, as Your Honor may remember, in which the  
Airline had a term union security agreement—I'm  
not positive whether it was check-off or union shop, but it  
was union security agreement.

The Court: Check-off.

Mr. Devaney: For a period of time.

The Court: Wasn't that what happened in Manning?  
They abolished or abrogated a check-off agreement?

Mr. Shapiro: Yes, Your Honor.

Mr. Devaney: Now—

The Court: Without Section 6 proceedings.

Mr. Devaney: Yes, when the contract expired, the rail—the airline said, and took the position that, “Look, the contract has now expired; we don't have to give Section 6 notice.” Now, the Court held that once it had become a

condition, that the carrier couldn't change it, couldn't abrogate it without giving the Section 6 notice.

610 Now, we think that there isn't any conceivable doubt here, where the strike has occurred, that the strike itself has changed the conditions. It changed the conditions by removing totally the availability of scope employees. They simply weren't there to perform the work. And in order to react to this, we merely say that during the period of the strike that this was an emergency condition and we had the right to operate with the manpower we had available.

Now, this, Your Honor, was the—this was the condition under which we were forced to operate on February 3rd. And on September the 1st, when we reduced these provisions to writing, this did not change the contracts that were in force and effect. And as we have said over and over again, at any time that any of the unions had terminated their strike and we had the manpower available, their original agreements would have applied and the conditions created by this emergency would have ceased to exist. They were justified only because of the emergency conditions in the emergency, and there is no longer any right to work in that manner.

611 Now again, this is not a unique position that Florida East Coast has come up with. There have been a considerable number of cases, as we've pointed out, which have gone to the Railroad Adjustment Board, in which this kind of a problem was involved, namely, what does a carrier do when faced with a strike or a refusal to cross a picket line? What can it do to perform the work? And everyone of the cases that we called to Your Honor's attention—in the Brotherhood of Railroad Trainmen case, were instances in which the carrier had had the work performed in a manner different from that required by the agreement or by some employee other than the person who would regularly have performed it, and it paid in a different manner. And in each of those cases,

the Adjustment Board held that the emergency created by the strike justified the carrier's performing this work.

Now, if you would like those citations again, Your Honor, I'll be glad to give them to you. Some of them which we've called to your attention before; now, these were *Brotherhood of Railroad Trainmen v. Kentucky and Indiana Terminal Railway Company*. This was the Adjustment Board First Division Award No. 17,055, 612 1955; *Brotherhood of Railway and Steamship Clerks in Macon, Dublin and Savannah Railroad*, Adjustment Board Third Division, Award No. 10,197, 1961; *Brotherhood of Maintenance of Way and St. Louis Southwestern Railway Company*, Adjustment Board Third Division, Award No. 5042, 1950; *Brotherhood of Maintenance of Way and Missouri and Pacific Railway Company*, Third Division, Award No. 5074, 1950; *Order of Railway Conductors and Boston and Main Railroad*, First Division, Award No. 13,341, in 1950.

Now, those cases, as I say, Your Honor, all involved instances of a refusal to work by the scope employees and performance of the work during this emergency period. And as they stated in the *Macon, Dublin and Savannah* case, it said that:

"The Board finds that due to the trainmen's strike, that an emergency condition existed which justified the action taken by the carrier during the period of the claim."

Now, we have never contended that we can cite these cases and say that this is a decision in which the Adjustment Board has had occasion to pass upon the operation of the railroad during a period equivalent to 613 the period operated by the Florida East Coast, but we do say that everyone of those cases clearly recognize that when a union engages in a strike which it is, in this case it's certainly authorized to do, when it does that the carrier is entitled to react to this emergency condition and perform the work with the personnel that it does have available.

Indeed, as we have pointed out to Your Honor before, this is the only way in which the right which is conceded on all sides in this case of the carrier to operate during the period of the strike can have any conceivable importance because, as the testimony here clearly indicates, there was no other way for the railroad to operate, and it cannot operate any other way today without reducing its service by approximately 50%.

Now, the second part, the (b) part of their complaint, they say that we have failed to consider all disputes with our employees in conference with their representatives.

Now, if one thing is clear from this record, Your Honor, we think it is that this is an absurd assertion. To  
 614 begin with, Florida East Coast gave the Section 6 notice of July 31st with regard to the union shop agreement, and it scheduled a meeting and, at the time and place scheduled for the meeting, the union refused to negotiate.

Now, the same thing occurred on the "Uniform Working Agreement" because we gave the Section 6 notice on September the 24th. Again, the meeting was scheduled and there was a refusal to bargain.

There isn't the slightest doubt that it has been the long-established practice of Florida East Coast to make stenographic reports of negotiations. Now, we did it from 1954 forward. A Court Reporter was not used until the strike limitation on personnel made it mandatory that we turn to a Court Reporter or to a recording device to take down these minutes. Now—

The Court: Excuse me for smiling.

Mr. Devaney: Yes, I understand.

Now, I take it that the only justification that I see from the union's comment to this is that they have no objection to having a record made, if it isn't an accurate record, or else they are saying that "We don't mind if you  
 615 did it in 1937 with a pencil. You've got to continue to do it. You can't have a stenotypist."

About all I can say is that this is typical to their reaction on most proposed changes, but I think that the way it is done, Your Honor, can have no conceivable bearing on whether the carrier acted properly or not. This was a long-established practice of the Florida East Coast. It was not one put into effect or brought to the fore for this proceeding by any stretch of the imagination, but was seized upon by the unions as a purported justification of what in truth was a flat refusal on their part to bargain. They had no intention to bargain. The question had never been raised before.

You will note from these transcripts there is no reason stated that would justify this. There's no situation here where there has been any interference with the collective bargaining process. Mr. Shapiro has said over and over that confidentiality is required on many of these phases. This is not a matter that really affects the confidentiality of disclosures made by the union to a Mediator, by a company to a Mediator. There is no problem here in  
616 trying to record what the union has told the Mediator. All we've asked for, all we've said that we believe is a proper procedure here, we've insisted upon, is, when we meet together in this negotiation, we want a record, we want an accurate record for our own knowledge as to what has occurred. We don't have infallible memories.

We do not find any thing in this that is contrary to any provision of the Act.

There was one case which Mr. Shapiro has mentioned which is the *Read and Prince* case, in which the National Labor Relations Board made the finding in that case that this was further evidence of the company's bad faith. Now, this was the case where there were innumerable unfair labor practices. The *Read and Prince* Board decision may be found in 96 N.L.R.B., page 850. It is 28 L.R.R.M., page 1610.

Now, this order was enforced by the Fourth Circuit. I'm sorry, by the First Circuit, at 205 Fed. (2nd), page 131. This First Circuit was 1953 and certiorari was denied at 346 U.S. 887, in 1953.

Now, while the Board, the N.L.R.B., had found  
617 that this was evidence, further evidence of the company's bad faith, the First Circuit did not agree with the Board. The First Circuit said:

"We are not inclined to agree with the Board that the company's insistence over the union's strenuous objection of having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the company's bad faith."

That's at 205 Fed. (2nd) 139.

Now, so far as—

The Court: That's 205?

Mr. Devaney: 205.

The Court: Thank you.

Mr. Devaney: Now, so far as I have been able to ascertain, so far as any authority has been cited by the Government at any point or by the unions at any point, that is the only case that has ever gone to Court involving the question of the use of a reporter in negotiations.

618 Now, quite recently there was another case before the Board. Now, this is at the Trial Examiner level. Trial Examiner Reel, Frederick U. Reel—

The Court: This is the National Mediation Board?

Mr. Devaney: National Labor Relations Board, Your Honor.

The Court: Oh, NLRB. All right.

Mr. Devaney: The Mediation Board is not a deliberate body that makes decisions.

The Court: I understand.

Mr. Devaney: So far as I know, in this area.

The Court: I wasn't sure whether you switched back and were talking about the Mediation Board. You are still talking about the National Labor Relations Board?



Mr. Devaney: Yes, your Honor.

The Court: All right.

619 Mr. Devaney: Now, Mr. Reel, in a case which was released in March—March 29 of 1964, the *St. Louis Typographical Union No. 8* and *Union Employer Section of the Graphic Arts Association of St. Louis*—it's NLRB Case No. 14-CB-1135—had this to say:

"In support of the argument that a party to the negotiations may properly insist on a transcript, general counsel and the Association advance a number of appealing reasons. They point out that such transcripts can be of great utility in the course of bargaining, facilitating reference to points agreed on or positions taken at earlier sessions, spurring the actual bargainers from laborious note-taking, thus enabling persons who are absent from a session to catch up on what transpired. Such transcripts moreover can be of great value even after the bargaining has been concluded. When a contract is reached, a question of whether a particular subject matter was discussed in the course of the negotiations may be of great importance in issues arising after execution of the contract."

620

And he cites a case which I'll omit.

"If a contract is not reached, the question of whether a particular party was negotiating in good faith may turn in part at least on statements made in the course of bargaining."

And again he cites authority which I shall omit.

"In either event, a stenographic transcript of the negotiations can be of marked assistance to the parties, the Board and the Courts in determining what was said."

Now, he goes on to say:

"The considerations urged by the respondent appear to be far less compelling, that such a transcript may be used



at subsequent Board or Court proceedings seem to me to be an argument for, not against keeping a record. If what is said at the bargaining conference becomes  
 621 relevant in a subsequent proceeding, an impartial court reporter's transcript taken at the time would seem preferable to the recollection of interested parties. By the same token, the argument that the statements of relatively untutored or unprofessional representatives of labor do not look good on the record when contrasted with the polished speech of management representatives, carries little force. Even if we assume its premise, we return to the proposition that if future attention is to be paid to what was said in the negotiations, the witnesses will be asked to repeat as nearly as possible what was said without rephrasing it to elevate the tone or diction of the speaker. The respondent also urged that a stenographic transcript may not be perfect but this obvious truth is of little avail for in subsequent use of the transcript, the way will be opened for correction or for express reservations as to its accuracy on particular points."

622 Now, he goes on and I'm not going to read all of it.

The Court: I'm sure he does. He's gone on a good ways now.

Mr. Devaney: Yes.

The Court: The point is, one person says, "I won't bargain without a reporter here"; and the other person says, "I won't bargain with one here". They both refuse to bargain. They don't get very far.

Mr. Devaney: Well, it is a question, Your Honor—

The Court: It's arguing about—it's just an argument about which one was more granite hard in their resolution to stick to this position.

Mr. Devaney: Except that I believe that it goes further than this, Your Honor; that the refusal to meet because of some alleged technical procedural objection seems to be the clearest kind of evidence that you could have that the

623 party who takes this position is really not willing to bargain at all.

Now, the third item which is listed in Paragraph 11 under (c), to say that we have not followed our obligation to make no change in rates of pay, rules and working conditions as embodied in agreements except as permitted by Section 6.

Now, as I have said already, the carrier gave the Section 6 notice. Our obligation quite clearly, if we were going to change these agreements, was to give the notice of desire to change the agreement. Now, having done this, the Act very clearly imposes on the parties, on both parties, an obligation to make reasonable effort to compose the differences that exist.

This was stated very clearly in *Virginia Railroad v. System Federation*, 300 U.S. 515, at page 548, decided in 1937. The same point was made in *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U.S. 711, at page 721. And that was decided in 1945. The Central—the *IAM v. Central Airlines* case was 372 U.S. 682, 10 L. Ed. (2d) 67, at page 73, decided in 1963.

Now, these were all cases that involved the construction of the obligation to meet and to confer, except the last one and I don't recall whether it involved that specifically but involved the statement by the Court that this was a mandatory obligation under the Act.

Now, if the union in this case can close the door to all bargaining by refusing to take the first step, we believe that it's plain that they have blatantly violated their obligation under the Act. While it is certainly written in terms of imposing this duty to meet and confer, obviously it presupposes that the parties are going to do this.

Now, when the door is closed to bargaining, we believe that the Chicago Northwestern case, that is, the *Order of Railroad Telegraphers v. Chicago and Northwestern*, which was cited by Mr. Shapiro and is 362 U.S. 330, in 1960,

represents a clear recognition of this right in the majority opinion. This, as Mr. Shapiro very correctly pointed out, was a case where the carrier proposed to make changes in its central agency plan and the union served a Section 6 notice. In response, it was met by the statement of the company that it wouldn't bargain. Now, it said that  
 625 the reason it wouldn't bargain was that this was to be determined by the Interstate Commerce Commission or various State commissions, and it later carved out an area about which it was willing to bargain. But about the union's basic Section 6 notice, it said that "This is not a matter we are required to bargain over. Your demand is unlawful." And Justice Black clearly recognizes the holding that the carrier had refused to bargain, whereupon the union engaged in a strike.

The majority—he equates this action to a situation where the refusal of the party to take this first step resulted in the self-help.

Now, it's quite true that Chicago and Northwestern is certainly distinguishable upon the ground that that involved an injunction against the strike and therefore a construction of Section 4 of the Norris-LaGuardia Act.

We believe that Reed, the Virginia Railroad, Joliet, and Central Airlines, Chicago and Northwestern together, clearly indicate that where one party refuses flatly and absolutely to begin bargaining, to take the first step that is required by the Act, that he is completely frustrating every  
 626 purpose that is intended by the Act and that this justifies self-help.

Now, from a technical standpoint, we believe that this is consistent with the Act, too. And we would call Your Honor's attention to the fact that Section 6 says in part that a party shall give 30 days written notice of an intended change in agreement. There will be the time and place for the beginning of conference between the representatives of the parties, and that this time and place shall be agreed upon within 10 days after receipt of the

notice and within 30 days provided for in the notice itself. And it says that in every case where such notice of intention has been given where conferences are being held, where services of the Mediation Board have been requested or the Board has proffered its services, rates of pay, rules and working conditions shall not be altered. Then it goes on to say:

"Unless a period of 10 days has elapsed after termination of conferences."

Now, at the very outset, it's clear, I believe, that Section 6 was fully cognizant of the fact that there could not  
627 be a closing of the door to meeting by the party.

That is, if you receive this notice, if you did not have a conference, that this permitted self-help.

Now, we believe that where there is a complete refusal to bargain and where there is a complete refusal to bargain as in this case, in contravention of the practice that had long been followed between the parties, that this means that there was no conference within the meaning of the Act. The conference means that the parties will meet and confer and make an effort to reach agreement. Where you refuse to meet as Section 6 specifically says, there is no conference.

Now, if we are wrong about this and we notified the was the same refusal to bargain. And it is quite true that because there was the refusal to bargain, the company felt and it feels now that it was entitled, because the refusal of the union to take this first step looking toward an agreement which is imposed as a mandatory obligation by the Act, that it could resort to self-help at that point.

Now, if we are wrong about this and we notify the Mediation Board after they had told us that the  
628 cases have been docketed, we nevertheless at no point refused to meet with the representatives of the Mediation Board. And the Mediation Board told us back in

October, I think one of the letters may have been November, that they were going to assign a Mediator.

Now, let's turn for one brief moment to look at Section 5. This is the Section which deals with the obligation and duties of the Mediation Board. Now, Section 5, First says, in part, that the Board shall promptly put itself in communication with the parties and shall use its best efforts by mediation. And it goes on down and says that if such efforts through mediation shall be unsuccessful, the Board shall at once endeavor as its final required action, and that's except the Emergency Board under Section 10, to induce the parties to submit their controversy to arbitration. If arbitration shall be refused, the Board shall at once notify both parties that its mediatory efforts have failed, and then, for 30 days thereafter, no change shall be made in the rates of pay.

Now, I don't think there can be any serious argument that Section 5, First imposes a very clear  
629 duty on the part of the Mediation Board to promptly put itself in communication and to promptly begin its mediatory efforts, or promptly at least to notify the parties that it isn't going to.

Now, in this case the Mediation Board took the position that it was going to assign a Mediator despite the company's position.

Now, it comes here in this action and it says that, "No, we don't—we didn't mean that. We really aren't going to assign a Mediator as long as the company has said that it—that it has put these provisions in effect."

Now, this is not what it said in the correspondence previously. It has waited some six or seven months before it has come to this position, and this is why we say that we do not believe that the Mediation Board, even if it has jurisdiction and because the company has not properly put these changes into effect, that it itself has not complied with the obligations imposed upon it under the Act.

Now, the last point that is mentioned in Paragraph 12 of the complaint is under (d) and that is that we are  
630 not permitted to make these changes until the matter has been finally acted upon by the Mediation Board.

Now, as I understand the position of the Mediation Board, Mr. Shapiro, the Mediation Board's position is that it hasn't done anything and it has no intention of doing anything and this may be forever, as far as their position is concerned, and that they are saying that until they get through, no matter how long it may take, no party may take any action whatever.

We submit to Your Honor that this is on its face not a reasonable position, either that the Mediation Board had jurisdiction or it had not. If it did have, it ought to have assigned a Mediator and it ought to have tried to bring the parties together and it ought to have pursued mediation without refusing, as the testimony clearly shows it did, that it refused even to call a meeting of the parties when the parties were willing to meet; that the Mediator has gone back and the Board has advised the company that this particular mediation, which was with the IARE, has been recessed for an indefinite period of time.

Now, what are they going to do? Are they  
631 going to sit on the outside without making any effort to mediate it? They objected to the presence of a reporter and we offered to meet separately with the union with a reporter and that any private discussion with the Mediator would not be reported. And this, they rejected out of hand as being something they were unwilling to do.

Now, Paragraph 12 injected for the first time the idea that Florida East Coast has not bargained in good faith.

Now, the only question of good faith that could possibly be raised is this reporter question. We think there can be no serious doubt that we had a perfect right to ask that the negotiations be—that minutes be kept by a reporter. And at no time has this been objected to, to the

point of a refusal to continue with negotiations, until this period of 1963.

Now, we don't believe that this newly arrived at concept, for no reason that has been pointed to by anyone as justifying their position, warrants the refusal to take this first step looking toward bargaining. And for the Government to contend as it has that Florida East Coast is there-  
632 fore guilty of bad faith, we think is totally without foundation.

Now, Count II involves the union shop notice of July 31st and, except for the difference in subject matter, the difference in dates, the same allegations were made in the complaint under Count II as were made with respect to Count I.

And Count III deals with this question again of the "Conditions of Employment".

Now, it is clear from the complaint and it's certainly made very clear in the Government's position in its memorandum in support of its Motion for Preliminary Injunction that no carrier may operate during the period of the strike except in absolute, strict compliance with the terms of all collective bargaining agreements that were in effect before the strike began.

Now, as I have said, the testimony in this case leaves no question whatever, Your Honor, that if this is so, and what the Government is saying here is that no carrier has the right to operate during the period of the strike, now, this is contrary to their own admission. It is contrary to all of the holdings of the Supreme Court, and I believe that the contention is obviously erroneous on its face.

633 We have the right to operate if we can during the period of the strike. The only way that any operation is possible is to use such manpower as we had.

Now, the contention has been made here by Mr. Shapiro that somehow the carrier has not hired enough people rapidly enough; otherwise we would have enough people today to operate under the old agreement.



Now, the testimony is uncontradicted in direct opposition to this statement. There isn't any doubt that the Florida East Coast has hired personnel from February 3rd, 1963, as rapidly as it can train them; that this training program has not decreased; that we have continued this program to the present time; that we still have only enough employees that, if we are required to operate only under the terms of the agreements as they existed before the strike, we would have to reduce the amount of service by at last 50%.

Now, Mr. Shapiro has said—

The Court: You've talked an hour. Do you want much more?

634 Mr. Devaney: No, Your Honor. I'll be very brief.

The Court: All right.

Mr. Devaney: Mr. Shapiro has suggested that the "Conditions of Employment" have relevance only with regard to the scope of the order. Now, we don't think that this is entirely true either. To begin with, the provisions of the Act which he has referred to have various provisions that there should be no change in conditions, rates of pay, hours and conditions, that is, until the notice is processed through the procedures of the Act.

Now, the procedures—I'm sorry—the conditions which have been required, imposed by the strike, were not substantially different than the conditions in the "Conditions of Employment". So that we say that if we are accused and if the Mediation Board says that we improperly changed the agreement, that there is no indication that we have not complied or that we have violated the Act in any way because the Act merely says that you shall not at that point change the conditions. We didn't change the

635 conditions to those imposed by the strike. We merely operated in the only way that we could operate.

Furthermore, we believe that the union shop question is separate to the extent that the unions on strike clearly do

not admit to membership these people who are now working, at least during the period of the strike. Unlike the BRT case that was before you earlier, Your Honor, there has been no attempt by any of these unions to try and enforce the union shop agreement during the period of the strike.

Now, the BRT had served notice on quite a number of employees, demanding their discharge because they hadn't become members of the union. That is not present in this case.

Now, Mr. Shapiro speculated as to why or what conceivable basis our assertion was made that the unions on strike had relinquished their claim to representation.

The Court: It was based on these letters.

Mr. Devaney: It is based on that in part, Your Honor, and in part on the statement which is set forth in  
636 their Strike Call, which they very plainly say that,  
"All the employees represented by us are out here on strike."

Now, we merely say that this—during the period of the strike, Your Honor, we believe that it is totally unrealistic to take the position that representation by the union does continue during the period of the strike for all purposes on the same basis. There isn't any doubt that, if they negotiate a new agreement, it would be applicable to all the employees within the class or craft. But as the unions in this case who were on strike have very clearly indicated, they haven't taken any of these new people into membership. They wouldn't be eligible if they did apply. And such members as have returned to work in many instances have been fined or expelled, or at least are subject to such action. And we believe that one, Mr. Hamilton, testified that while they haven't taken this action they have deferred this whole matter for decision until after the strike is terminated; but I think that the fact that these people who  
are now working are not eligible for membership,  
637 and whether they have been expelled if they are a former member, I think that they are all subject to

it. And for this reason, we believe that, whatever else may be true of the union shop notice, during the period of the strike this act of discrimination has rendered the union shop agreement totally unenforceable as to the new employees and we believe that this is required by Section 2, Eleventh, because Section, 2, Eleventh of the Act says that no agreement shall be permitted which discriminates against any employee with respect to whom membership is not available on uniform terms and conditions.

Thank you very much.

The Court: Yes, sir.

Do you want to go ahead at this time?

Mr. Rutledge: No, Your Honor. As a matter of fact, we submit that there wasn't anything new here presented. We've presented our position to the Court in the prior case and submitted the brief to the Court and our legal position is the same. I would only like to point out one difference

here between the BRT case and this case, and that is  
 638 in the BRT case, there was more substance, although we submit not much, to their contention that it was a minor dispute, because they said in the BRT case that they were operating under the "Conditions of Employment" which were in effect during the strike. They don't even say that here. They say they are operating under a contract which they put into effect unilaterally. They say they have the right to do it because the union didn't negotiate properly, or something of that sort, despite the fact that the Mediation Board has taken jurisdiction; but they are not claiming here that they are operating under some sort of contract suspension theory. They are actually saying, as I understood the testimony, that they are operating under a "Uniform Working Agreement" which they have put into effect under Section 6 legally.

So we submit that the major-minor issue here is really non-existent. This clearly is a major issue and the Norris-LaGuardia phase of the matter, we submit the same authorities we cited to you apply; and that here the issue is

whether the railroad that decides to operate during the strike also has the right to operate legally free of the restrictions of the Railway Labor Act. We submit  
 639 the plain language of the Act, the policy of the Act require that the decision of the Court be that, if a railroad decides to operate during the strike, it still must operate according to the terms of the Railway Labor Act.

Thank you, Your Honor.

Mr. Shapiro: Unless Your Honor has questions addressed to the authorities and matters Mr. Devaney referred to that I didn't anticipate in my argument in chief, I'll rest at this point.

Mr. Devaney: Your Honor, there is one point I neglected to mention.

The Court: A little louder, Mr. Devaney.

Mr. Devaney: I say there is one more point I neglected to mention, which I think is important. We raised it in our brief.

This is the basic contention that we do not believe that anything that has been said here by the plaintiff or the intervenors has shown any conceivable basis for the claimed  
 irreparable harm.

640 We think, in the absence of this, that clearly the Norris-LaGuardia Act bars any injunctive relief, any preliminary injunctive relief.

Now, we have shown the irreparable harm to the Florida East Coast. But nothing that Mr. Shapiro has said, nothing that the unions have said, has indicated the slightest irreparable harm to the public interest which they assert is in existence.

The Court: You may want to reply to this.

Mr. Shapiro: Yes, Your Honor. I do.

The irreparable harm here is the harm to the operation of the Railway Labor Act, to the function of the Mediation Board, to the effort to minimize and eliminate this dispute by going through the processes of the Act. Every time that the processes of the Act are frustrated on an extra-

ordinary scale as they have been frustrated in this case, there is irreparable harm and direct irreparable harm to public interest. And that is why we come seeking injunctive relief.

641 Mr. Devaney: If I may respond to that, Your Honor, may I simply say this:

That the alleged violation of the Railway Labor Act seems pretty difficult to extort and to construe the obligations of the Railway Labor Act, since the strike occurred—it is a legal strike; we don't contest it—but I defy Mr. Shapiro or anyone else to point to any provision of the Railway Labor Act which was designed or intended to govern what happens during the period of a strike. This whole Act was designed and was intended to govern what happens to the agreements in normal operation. There is nothing in the Act which says that during the period of a strike you cannot continue to operate. All the decisions of the Supreme Court have clearly indicated on this point that employer has the unquestioned right to operate during the period of the strike.

Now, we have cited these cases from the Railway Adjustment Board where the same kind of issue has been considered. Not one case has anybody cited to Your Honor which challenges this one iota; not one authority has been cited for this. This case is purely and simply one  
642 of a strike where the carrier has merely reacted to the questions presented in the course of the strike.

Now, after those conditions have come into existence, then it is quite true they did give the Section 6 notices; but the problem at the outset is one of the strike itself. This is not a question that is even within Section 6. This is not a question that, once the unions are free to resort to self-help, the Railway Labor Act and the provisions of the Railway Labor Act as to the strike itself ends. It does not go beyond that point.

The Court: I certainly agree. I suppose Mr. Shapiro and the other gentlemen will agree this is the basic point

of difference in the view of the law expressed by the United States and by the intervenors and that that you express here.

Do you want to reply any further? I tell you, he's probably going to want the last word whatever you say, so go ahead.

Mr. Shapiro: Your Honor, I think the only authority that we haven't mentioned before in this was the *Mine Workers* case and, as to that, having read it at the  
643 time that the Government thought there was going to be a national railway strike, I can say that it stands for the proposition that after the processes of the Railway Labor Act are exhausted, the Norris-LaGuardia Act prevents the United States from obtaining the kind of injunction it could have obtained in the Debs case; but that is after the processes of the Railway Labor Act have been exhausted.

Now, I don't think that I have any other matter that has not at least been touched on.

The Court: Is this last case cited in the brief?

Mr. Shapiro: It was cited by Mr. Devaney's argument. It is *United Mine Workers—United States v. Mine Workers*.

The Court: Oh, I thought you said Iron Workers.

Mr. Shapiro: No, it's Mine Workers.

The Court: I know the case you're talking about now.

Mr. Shapiro: I think we have at least touched upon every other point they have raised and indicated our position.

644 The Court: Well, Gentlemen, I'll say this:

I'll try to reach a prompt decision. I do think I may delay it for a reasonably short time to see if something does come out on this Trainmen's case, out of the Court of Appeals reasonably promptly.

I don't undertake to delay a decision on this case until they decide it because it might be sometime, but I think that some opportunity to see what is coming out of that case ought to be indulged.

I'll reserve the right to call on counsel for either or both parties to furnish me proposed findings and conclusions. I'm ready to do that at this time and study the matter more.

If there is nothing further, we'll take an adjournment in this matter.

Mr. Shapiro: Thank you, Your Honor.

Mr. Devaney: I think Mr. Milledge wanted to ask a question about 64-112, the Motion in that case. Did you want to set a time later this afternoon or a later date for argument in that?

645 Mr. Milledge: That is the Adjustment Board? Is that the one you are speaking of?

Mr. Devaney: Yes.

Mr. Milledge: That was the case, Your Honor, where Mr. Devaney contends the case should be stayed because the railroad, about a year ago, requested a rehearing which has never been ruled on. I believe you said that at the conclusion of this case that we might argue it.

The Court: Do you have that file here, 64-112? It's a new case that was just filed a few weeks ago and Mr. Devaney has moved to dismiss it or stay it.

What comment would you make about his motion?

Mr. Milledge: Well, it's a law suit—

The Court: Would you agree to a stay, that it should be stayed?

Mr. Milledge: No, Your Honor can read the provision of 153(p) which both authorized the law suit and also  
646 does not provide for any stay. It doesn't provide for any rehearing, as a matter of fact. There is no provision for a rehearing at all.

Now, you'll notice in Mr. Devaney's motion that this, the Petition for a Rehearing, was filed over a year ago. The Adjustment Board is composed of an equal number of railroad-designated people and company—union and management people, and then there's one impartial person. And a rehearing just sits there and will sit there forever



unless the proponents bring it up; and, of course, they haven't seen fit to do that in over a year.

Now, there is no statutory authority whatsoever for staying this pending rehearing because the rehearing is not provided for by statute. And of course, this could also happen in a Court proceeding. A District Court judgment is not automatically stayed unless a supersedeas or some provision for staying it.

The Court: The positions are: He says that it was not administratively final so that you could bring a suit.  
647 And you said that it was administratively final so that the suit could be brought.

Mr. Milledge: Right. And the statute 153 (p) provides that.

The Court: I wonder if you gentlemen would be agreeable to submit this motion without further argument?

Mr. Devaney: I have no objection, Your Honor.

The Court: I tell you, I would suggest this: That we consider it submitted and with the right of either party to file a brief, to send me briefs on it within ten days if there is something you want to argue on brief. That is the whole point.

Mr. Milledge: That's it.

Mr. Devaney: We have submitted to you already a memorandum.

The Court: I don't believe.

Mr. Devaney: We filed it, Your Honor.

648 The Court: No, this looks like you gave me two or three copies of the motion.

Mr. Devaney: Yes, Your Honor.

The Court: Let me pull off one of these and give you the remainder back. You may want those extra copies.

Mr. Devaney: Now, I would merely call Your Honor's attention to the fact that, as set forth, there is an Opinion of the United States Attorney General dealing with this question. Opinion of the Attorney General 212, at the first page of our memorandum, and we have no objec-

tion whatever to submitting it on the memorandum that we have already submitted and served on the plaintiff.

The Court: Maybe you would reply to this memorandum?

Mr. Milledge: I will.

The Court: In a week or ten days and let me rule.

649 Mr. Milledge: Right. I don't think I have a copy of the memorandum. I have a copy of the motion.

Judge, there is just one other thing; it's just a ministerial matter in regard to this. 153(p) provides that you proceed without payment of costs. The Clerk read—the Clerk's office, Mr. Blake, read the statute and didn't require me to pay any filing fee. The Marshal's office was in doubt as to this and sent me a bill and I have an order on this, which you could enter at some convenient time.

The Court: That's in the same case, is it?

Mr. Milledge: Yes, sir.

Mr. Devaney: I have no objection to that.

The Court:

"The petitioner shall not be liable for the costs in the District Court and the costs in any subsequent proceeding."

Well, your order may not—well, I think that's all  
650 right. Go ahead and enter it. There is something in the Act there that this order may have to be amended to follow this provision:

"Such costs shall be paid out of the appropriations for the expenses of the Courts of the United States."

Now, that may have to be put in here.

Mr. Milledge: All right, sir.

The Court: But a any rate, we can enter this order. This is the 28th.

The Clerk: Yes, sir.

The Court: Well, I'll hold this motion until I have a reply from you.

Mr. Milledge: All right, fine.

The Court: A week or ten days.

Mr. Milledge: It will be very short.

The Court: All right. Then we can take an adjournment.

651      Thank you, Gentlemen.

(And thereupon, at 1:15 o'clock p.m., on Thursday, May 28, 1964, the Court adjourned.)

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1           IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

No. 64-107-Civil-J

UNITED STATES OF AMERICA

v.

FLORIDA EAST COAST RAILWAY COMPANY

**Transcript of Proceedings**

Before the HONORABLE BRYAN SIMPSON,  
Judge of the above Court,  
Commencing at 10 :05 o'clock a.m.,  
Monday, November 30, 1964.

JOSEPH A. SHERIDAN,  
Official Reporter.

2       Appearances

For the Plaintiff:

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3 The Court: Good morning.

The appearances are the same as before.

This is a postponed hearing set earlier on the Application of the Defendant in 64-107 for approval of employment practices in certain listed categories; in effect, for modification, is what it would be, modification of the Preliminary Injunction.

Mr. Devaney: Well, essentially—

The Court: Under the terms of the Injunction.

Mr. Devaney: That is correct.

The Court: Under the terms of the Injunction, the Defendants were given leave to apply for approval of necessary changes, changes made necessary by the strike conditions.

Mr. Devaney: That is correct, Your Honor.

4       The Court: All right, I'm ready. I suppose you have the lead here. If you want to make a preliminary statement or if there are any stipuations with respect to facts that you gentlemen have worked out, I'll take any preliminary matter and then go on into the hearing.

We have not worked out any stipulations, Your Honor.

I would like, as a preliminary matter, to say that we have filed an Application in 64-239, which we have requested be heard at the conclusion of this hearing on the Application in 64-107.

The Court: 64-239 is—

Mr. Devaney: The Engineers' case.

The Court: —the Engineers' case.

All right, sir, I'll undertake to hear that. I have another matter set at 2:00 or 2:30 this afternoon which I believe has gone off. My secretary is 'phoning counsel now and I'll be able to give you—if it stays on, we might have to take a break and come back later in the day but we'll get to it.

5       Mr. Devaney: Very well. Thank you, Your Honor.

This, as you have indicated, is an Application pursuant to the terms of the Preliminary Injunction which was entered on October 30th.

Now, we have placed into effect all of the provisions of the prior collective bargaining agreements, including the wage rates and the job descriptions, the hours, as to the lunch hour. We reinstated all of the provisions of the prior collective bargaining agreements and the Defendant has advertised, through the bulletining procedure, for the additional jobs required to permit it to comply with the collective bargaining agreements.

We received out of the hundred and, I believe, 114 jobs bid, we received a total of three bids, one of whom was by a person not qualified for the position bid. One of the



two remaining bidders declined to cross the picket line and report for work. Only one additional person actually reported for work. Now their responses, or at least some of them, are indicated from the organizations themselves in Exhibits 1 through 14 which are attached to the

6 Application for approval of employment practices.

Now, additional responses have been received from individuals. And following the initial failure of the employees to submit bids, pursuant to the provisions of the agreements which provide for the assignment of senior employees where no bid is received, Defendant took this step and assigned employees to the various jobs for which the bulletins had been issued. And through this procedure, we received a large number of individual responses from these individuals, declining to report for the assigned jobs.

Now, this means, as far as the Defendant is concerned, Your Honor, that we have put into effect and into operation all of the provisions of the existing collective bargaining agreements concerning the wages, the hours, the working conditions, and we are now complying fully with the provisions of those agreements except to the extent that the lack of man power prevents our doing so. And these are the subject matter of this Application.

Now, the first request is that we shall not be deemed in violation of any existing collective bargaining agree-  
7 ment for failure to observe craft or seniority district restrictions.

Second, that we shall not be deemed in violation of any existing agreement by requiring and permitting supervisors to perform craft work, so long as we do not have sufficient qualified personnel.

Three, that we ask that we not be deemed in violation of any existing collective bargaining agreement by exceeding the apprenticeship or the apprentice or trainee ratio and the maximum age limitations contained in the agreement.

Now, the apprentice ratio or the trainee ratio, Your Honor, means that, under normal circumstances, you may

have only a given number of apprentices or trainees to the number of journeymen in a particular craft.

The Court: That's set by this separate agreement, I suppose?

Mr. Devaney: That's correct, Your Honor.

In addition, the agreements place two limitations on the maximum. There is a minimum age on apprentices, which we are not concerned with. There's also a maximum  
8 age of the apprentices, that is, the maximum age for a person to enter the apprentice training program. There's also maximum age on a person entering or being employed as a helper.

Because of the shortage of man power, we have had to hire people possessing qualifications to do the work. And if we are to provide the people eventually required to comply with all of the craft lines, we have no choice but to continue to hire people without regard to these technical limitations on age and the ratio of apprentices to journeymen.

Now, five, we do not believe that the agreement places any limitation on our right to contract out work which is presently being contracted out; but to avoid any later assertion that we are doing or engaging in a practice that is in someway in violation of the Order, we also request that we be permitted to continue the contracting out of work, which has been necessary since the strike began because of the shortage of qualified personnel to perform it with our own employees.

Number six—

The Court: Going back to five: Generally, what is  
9 the type of work that is contracted out?

Mr. Devaney: Well, in the beginning of the strike, Your Honor, part of the Maintenance of Way work was contracted out because we did not have employees to perform it. Now, those—the general Maintenance of Way has been taken over by the Florida East Coast's own em-

employees as we have acquired the employees, and the employees with sufficient skill to perform this work.

There is certain bridge construction which, as a matter of fact, bridge construction or various types of construction has always been contracted out when the Carrier did not have the equipment or the personnel to perform it. There is some bridge construction work which is being contracted out at the present time.

In the installation of CTC, the work had been undertaken prior to the strike by Florida East Coast with its own employees. When the strike began, we did not have any employees who could do this work, except the supervisors themselves, and the installation of CTC was contracted out.

10 The Court: Don't—you'll have to amend that shorthand CPC doesn't mean anything to me.

Mr. Devaney: This is Centralized Traffic Control, Your Honor.

The Court: CTC?

Mr. Devaney: CTC, yes, Your Honor; Centralized Traffic Control, which is being installed on—

The Court: I've heard, I know what it is now. I thought you said CPC and I misunderstood you.

Mr. Devaney: Those basically are the types of work that we are contracting out at the present time. None of this work that is being contracted out, Your Honor, is—I mean, this is work which we have had to contract out since the beginning of the strike. It is not work which we are suggesting should now be contracted out to avoid the compliance with the Order of the Court in any sense. This is work that, from the beginning of the strike, has been contracted out because of the shortage of man power to perform it with our own employees.

11 Number six relates to the bridge tending, which is being performed by supervisory or contract employees during the period of the strike. Now, the Maintenance of Way agreement does provide that the normal

operation of bridge tending would be performed by members represented by that organization. With the advent of the strike, there were no members of the organization available and, as part of the over-all security imposed upon the Railroad by the strike conditions, the bridge tending has been and is now being performed as part of the over-all security operation of the Railroad.

Number seven, we ask that we shall not be required to furnish seniority rosters except upon express Order of the Court conditioning the receipt of the rosters by the General Chairman or other designated official to the proper and legitimate use of the seniority information, for the proper and legitimate policing of their collective bargaining agreements; and if any misuse is made, that such official will be answerable to the Court.

Number eight, we ask that the Union Shop provisions of each of the collective bargaining agreements  
 12 be declared void and unenforceable as to new employees hired since January 23, 1963, or as to returnees, unless and until the organization, including both the Local and the International, demonstrates that membership is available to those new employees without discrimination.

Now, in connection with the last matter, Your Honor, it was developed on the record in the initial hearing that various discriminations had occurred as to the employees working since the period of the strike and that none of these new employees had been admitted to membership. Since that time, Your Honor, we shall show that the present employees have made application for membership, that none of them have been admitted; that in fact, instead of admitting them, they have again sought a great deal of information about the individuals which does not appear to have any reasonable relationship to the ordinary application for membership.

These conditions we believe, Your Honor, are reasonably

necessary for the continued operation of the Railroad under the strike conditions.

13 The Defendant is now providing service to the public which the public needs and requires. We can and will continue to provide the service if we are free to continue to use the employees that we have available.

We have made every reasonable effort, not only through the present bulletining procedure but in hiring and training employees throughout the period that we have been operating since the strike began, to hire and train employees and, pursuant to the Order of this Court, we have bulletined the jobs which were immediately required to permit us to comply with the provisions of the various agreements of the organizations. And as I've said, we got essentially no response—three out of a total of 114 jobs were bid. Only one of the bidders actually showed up for work. This means that we simply do not have presently available sufficient personnel to permit the full compliance with the provisions of the collective bargaining agreement relating to the crossing of craft lines, relating to the supervisors performing absolutely no scope work, and with regard to the apprenticeship limitations as to age and to ratio, and with regard to the bridge  
14 tending, which as a security measure has been of necessity made an over-all part of the security measures of the Defendant.

Now, I might say that in addition to the necessity for making protection of the bridges part of the over-all security measures of the Defendant, that the Maintenance of Way organization specifically responded that its employees were not going to be permitted to accept any of the positions which were bid. Now, these were not bridge tending jobs, Your Honor, but that they would not be permitted to return to work during the period of the strike.

So that we, again, are faced with a situation that under no circumstance would those people be available for work;

and because of the necessity of providing protection for the various bridges, the work that they are now doing has taken on a different and broader aspect than merely the bridge tending. It's part bridge tending and it is part the security of the bridges. Quite a number of bridges have been destroyed and other attempts to destroy bridges have been made, and this is a necessary measure which the

15 Railroad has had to take in order to protect its property and to protect its present employees against additional danger from the sabotage of its property.

Now, for these reasons, Your Honor, we believe that all of these conditions are reasonably necessary to permit us to continue to operate and we are prepared to present additional testimony in evidence to supplement the record which has already been made in this matter, which in general ways relate to some of the provisions, but we believe that the specific information with respect to the actual steps taken in bulletining procedures, and responses, as well as our over-all training program is necessary for the full understanding of the Court in ruling on this Application. And we are prepared to go forward with this evidence.

The Court: Do you want to make any reply before we start? You or the Intervenor?

Mr. Shapiro: Just very briefly, Your Honor.

Since this is an Application under Paragraph 2(b) of the Injunction of October 30, it is to be guided by the decision of the Court of Appeals in *Brotherhood of Railroad*  
 16 *Trainmen v. Florida East Coast Railway Company*,  
 now reported at 326 F. 2nd 172.

In that decision, as we understand it, the FEC must convince Your Honor of the reasonable necessity for the departures from the collective bargaining agreements which it seeks in the light of the present strike situation on the Carrier, and this must be by a select item-by-item approach. Those are the words the Court of Appeals used.

Now, the Government would like to preserve its disagreement for the record with the Court of Appeals' decision, recognizing of course that Your Honor is bound by it at this time.

Just summarizing it, we think that the decision, insofar as it authorizes departures from the express language of the Act, is inconsistent with the statutory language—that it will expand the area of controversy in labor disputes beyond the areas which are contemplated by the statute; that it will invite the transference of labor disputes into the Courts; that the standards that it lays down do not provide sufficient guidance and that it renders a precise statute which is in part enforceable by criminal sanctions unduly vague.

Now, having preserved the objection, we turn to the sufficiency of the Application by the FEC under the Fifth Circuit's decision.

There are two items in the Application, I think, which should be stricken on this proceeding. They are Items 7 and 8 relating to the furnishing of seniority rosters and to a declaration that the Union Shop provision is void and unenforceable. Neither of those provisions in the Application relate to the operation of the Railroad. Whether the seniority rosters are furnished or not is not a matter which will either benefit the Carrier or harm it.

The Union Shop provisions simply relate to a matter of employee rights. They do not directly involve the operation of the Railroad.

We believe that those have no part in this proceeding under Paragraph 2(b) of the Court's Decree.

Now, that leaves Items 1 through 6 of the Application, as listed on pages 2 and 3.

Our first objection is that, with the exception of Items 3 and 6, these are not item-by-item applications as contemplated by the Court of Appeals' decision.



Now, Item 3 deals with apprentice ratios, which I understand cuts across the board in all these collective bargaining agreements. Since the Carrier is forced to resort to non-Union help, obviously it can't hire journeymen with any ease since most of the journeymen in the industry are Union people. I understand that it takes in the non-operating crafts some three or four years to become a journeyman, so the Government recognizes that the Carrier will have to resort to some apprentice help and we would not object to Item 3 in the Application.

Item 6 deals with bridge tending during the period of the strike. Now, that is quite specific and, without in anyway indicating the view of the Government that any labor organization is involved in any of the acts of violence which have been alleged in connection with this labor dispute, we recognize that the feelings have run high, there has been some danger to the Railroad's property, and since the matter of bridge tending is connected with the security of the Carrier, the Government would not  
19      object to Item 6.

Now, this leaves Items 1, 2, 4 and 5. These, we think, are too broad and too vague to be sufficient in law under the Court of Appeals' decision.

The first item is that the Carrier shall not be deemed in violation of any agreement for failure to observe craft or seniority district restrictions.

What is the scope of that? The Application doesn't tell us. Is it all crafts, all non-operating Unions? Does it affect the operating crafts or classes? Is it limited to the 114 jobs which were bulletined? Does it go more broadly than that? What jobs are involved?

Well, on its face, we think that item is simply too broad to mean the selective item-by-item requirement that is laid down in the Court of Appeals' decision. I think that the Court of Appeals contemplated an approach in which the specific jobs involved would be specified and the right to

depart from the agreement in connection with specific jobs would be demonstrated.

Now, the second item deals with the use of supervisors to perform craft work, so long as it does not have qualified personnel.

20 Again, the problem is one of scope. What positions are covered? How far does it go? We are given no indication at all in the Application or in the supporting affidavits as to the specific positions involved. In fact, we don't even know what the 114 jobs that were bulletined are, as far as this Application is concerned. No list has been provided to the Court and none to the Government.

What has been said about supervisors I think would apply equally to Item 4, dealing with non-exempt foremen.

Now, Item 5 dealing with contracting out suffers from the same difficulties.

Although these items, these four items I have enumerated, are in our view insufficient in law, I don't believe that the Application could be denied on its face. We are moving into a new area of law here and perhaps the Carrier can by proof make up these difficulties.

The affidavits which have been submitted do not satisfy these requirements, the requirements of the Court of Appeals' decision. They are worded very generally and  
21 really give very little indication of what is precisely involved. We know only that the Carrier maintains that if it can—if it had filled the 114 jobs which it says it has bulletined, that it could then be in immediate compliance with the Court's Decree. This indeed was Mr. Thornton's language in his affidavit in which he says, on the second page of the Carrier's Exhibit 15:

"That in an effort to obtain the qualified employees necessary to perform the work of the various non-operating employees in full compliance with existing collective bargaining agreements, 114 jobs were bulletined. This repre-

sented the immediate number of jobs required to comply fully with the agreements."

Now, I think that a similar statement appears in Mr. Wyckoff's affidavit. And these statements should be considered in the light of the testimony which we heard earlier in this case, in which it was suggested that it might take as much as a year to come into full compliance with the collective bargaining agreements, and that something like 600 new jobs would be required.

22      How should the BRT decision be applied?

We have indicated in a memorandum filed on September 24 our view of the decision. We think that, when the Carrier comes in and asks for the extraordinary relief of being excused from the express requirements of Section 2, Seventh of the Railway Labor Act, it has a heavy burden. We think that it has to refer to the totality of circumstances surrounding the strike and that the Court should take into account not only the immediate application but all of the prior history of the strike which has been made of record, all of the prior proceedings relating to the strike. It should take into account the efforts of the Carrier to comply with the collective bargaining agreements, its efforts to restore operations in compliance with those agreements. It can take into account, of course, operating factors such as reflected by comparative levels of operation and financial considerations, although these are not, as individual mechanical items, controlling. It's the over-all picture which is controlling.

23      The Carrier is, of course, not permitted to depart from the collective bargaining agreements by reason of changes in its operating standards which are not directly related to the strike.

For instance, if the Carrier complains that it can't maintain sufficient qualified personnel because since the strike began it has increased its educational requirements or physical requirements or other recruiting requirements, these are exercises of its own choice not relating to the

strike and they do not excuse departure from the collective bargaining agreements.

Now, if Your Honor should be disposed to grant these items that the Carrier has requested after proof, we think that any approval of departures from the collective bargaining agreements should be subject to the requirement that the Carrier undertake a recruiting and training program aimed at bringing itself into compliance with the agreements. And to this end, any authorization to depart from the agreements should be limited in time, and a very brief time, no more than four or five weeks, so that the Carrier is constantly under the obligation to go out and recruit and bring itself into compliance with the  
 24 agreements. Absent this, why it becomes in the interest of the Carrier to prolong the labor difficulties as long as it can, because it is then able to operate free from the restrictions of the collective bargaining agreements which are there to protect the employees.

Now, that concludes the Government's statement.

The Court: Do you have a statement you care to make, Mr. Milledge?

Mr. Milledge: Just a moment.

Essentially, our position is very similar to the Government's. Our first position of course, as Your Honor knows, is that the same as the reasonable necessity. We have taken, requested certiorari, to the Supreme Court from the Court of Appeals' decision of the Fifth Circuit and we would like the record to be clear that we preserve our position that reasonably necessary exceptions are improper but they do constitute the state of the law at the moment.

We think clearly that the matters of seniority rosters and the Union Shop, there should be no testimony  
 25 pertaining to them today. There is no question, it doesn't involve man power at all, and we have been through all of this. It has already been handled. There are no present problems regarding them.

I might say on Union Shop, the only situation there is the Union Shop provisions are still in effect. Employees might be subject to dismissal for failure to comply but, as Your Honor knows from the past testimony, in the first place, it's not the Unions that fire them. It has to be the Company that discharges the people and the organizations have made no requests for discharges. And so it's not a present issue that would have any relationship to man power at the present time.

Now, just by way of supplementing what Mr. Shapiro said, this blanket request, if they were granted in this form, we would have no collective bargaining contracts. Nobody would have any rights out there at all.

Now, there are different circumstances in different crafts which might possibly—I'm not sure what the proof is, but might possibly entitle the Railroad to some temporary exception as to a particular craft for a short period of  
 26 time; just as, for instance, this one about contracting out work, Your Honor asked Mr. Devaney about that and he's really only asking for that for two crafts, the Signalmen and the Maintenance of Way.

Now, I think the facts will show that the situation in the different crafts is quite different and the contracts are different, and there might be some need to use a supervisor or non-exempt supervisors in one craft temporarily but not in others. So I think the proof will have to come on to show what the situation is in different crafts.

Now, the one other thing is this: I assume that this Petition is directed only to the non-operating crafts. This law suit brought by the Government does possibly have a broader application but I think this could be taken care of by proof, that is, or at least by whatever Order is entered, that the Order will direct itself, in the event Your Honor does see fit to grant the Railroad any exceptions, will direct itself to a provision of a particular contract; or if it is broader than that, then to particular—perhaps particular types of provisions in several contracts.

27 But there is this great vagueness about the Application as to what is being sought and it would certainly appear that they are only talking about the non-operating crafts presently on strike; but I think that's just one of the elements of vagueness in this whole thing.

It would seem to me there is one other basic consideration and that is that this Carrier now comes before the Court—

The Court: Excuse me, but the Injunction is limited to—

Mr. Milledge: No, sir.

The Court: The Court's Injunction?

Mr. Milledge: Well, on conditions of employment, which is the individual agreements, it's broad, that is, it enjoins them from any operation under that. I don't think the non-operating organizations are mentioned in the Injunction at all. Are they, Mr. Shapiro?

28 Mr. Shapiro: No, I don't think so. The Injunction doesn't specifically mention the non-operating organizations, as I recall.

Your Honor may remember that we considered the scope of No. 3 of the Complaint, which raised the Carrier's "Conditions of Employment" of September 1, 1963. Now, those "Conditions of Employment" covered both operating and non-operating crafts or classes. And when the "Conditions of Employment" were enjoined, I think the Injunction also reached any similar provision; so, to that extent, the Carrier was enjoined from resorting to any temporary "Conditions of Employment" which would affect its operating people.

Mr. Devaney: Your Honor, may I say on this, perhaps for clarification:

Number 1, I think that both Mr. Milledge and Mr. Shapiro are overlooking one fact; Number 1, the Complaint filed in this action did identify in the appendices attached to the original Complaint, the Complaint identified the various organizations, all of which were non-

operating organizations which were actual parties, or in effect parties named in the Complaint.

Now, we are not asking in this Application, Your  
 29 Honor, that this apply to operating personnel. I don't believe by the same token that the Complaint applies to the operating organizations, because they were never made a part. There were never any motions, never any amendments to the Complaint to bring them in as parties. There was testimony, which we objected to coming in, about some of the agreements that the operating unions had but they were never actually made parties. There was no amendment of the Complaint which could have made them parties, and this Application was not intended to broaden the original scope of the Complaint or the Order by bringing in the operating unions, which were never a party to the Complaint.

Mr. Shapiro: It may be that we are discussing a relatively moot point. If the Application by the Carrier does not purport in anyway to affect any operating unions, then, as far as this proceeding is concerned, we needn't debate it further.

Now, we did discuss this issue during the hearing.

Now, the suit was brought by the United States, not  
 by the Unions. One of the Counts was to enjoin  
 30 the operation under the "Conditions of Employment". The proof in the earlier proceedings showed that the "Conditions of Employment" applied to the operating unions, and the Carrier was directed in the Decree to refrain from continuing in any manner or taking any action under the "Conditions of Employment" of September 1, 1963, except by agreement with the several crafts or classes. This is Paragraph 1(c) of the Complaint.

Be that as it may, as I said just a moment ago, if Mr. Devaney is telling us now that the Application he is presently making is not intended to in anyway go outside of the non-operating crafts or classes, I think that the record is clarified for this proceeding and we needn't go any further.



Mr. Devaney: That's right. And the only question I would have is the one Mr. Shapiro raised, which was completely new to me, that he was contending that this did, that Your Honor's Order applied to operating unions. It was certainly not our impression that it did; and by that reason, we had no intention that our Application would have any application to it. It was assumed we agreed  
 31 this was involving non-operating unions. Mr. Shapiro agreed that the original Order didn't apply to the operating unions and—

Mr. Shapiro: I hadn't agreed that the original Order didn't apply; only that your Application didn't apply. On that basis—

Mr. Devaney: If you are going to say that the original Order, in your opinion, applies to the operating unions, we will have no choice but to take the position that we must amend our Application and make it applicable to the operating unions. But you are saying that this applies to organizations which were never made a party to the Complaint, they were never made a party to the law suit. There was never any motion made to amend your Complaint to bring them in as parties.

Now, I think, under these circumstances—

The Court: Of course, the United States is a party. The United States was a party.

Mr. Devaney: The United States brought the  
 32 suit, Your Honor, and it listed in appendices—

The Court: There is an intervention by the non-operating unions only, not any intervention by operating unions.

Mr. Devaney: That is correct.

The Court: So that the non-ops are the only actual parties to the litigation, as Intervenors.

Mr. Devaney: That's correct, Your Honor.

And the appendices, Your Honor, listed the non-operating unions only as being those organizations on behalf of whom the Complaint was filed.

Mr. Shapiro: The Complaint was filed on behalf of the United States. The appendices relate to Counts One and Two of the Complaint.

Count Three of the Complaint was addressed to the "Conditions of Employment" which the proof established covered both operating and non-operating crafts or classes.

I don't know that we are advancing our cause  
33 here. If the Application does not apply to the  
operating crafts or classes, then we needn't debate  
it further.

If it is intended to apply to them, then I think we've got to consider that as an item in the proof.

Now, the matter is complicated somewhat by the fact that the Brotherhood of Railroad Trainmen, and now I understand the Brotherhood of Locomotive Engineers, have separate law suits relating to these matters. But insofar as the Carrier is seeking to depart from the collective bargaining agreements in line with its "Conditions of Employment" of September 1, 1963, or in connection with its practices that were involved with the Conditions of September 1, 1963, I think the Decree does cover the operating crafts or classes.

We did refer to this in the proof. I think there was an exchange between Mr. Devaney and I concerning the scope of the Complaint at that time. And the examination of Mr. Wyckoff on the first morning went in large part to the operating crafts or classes and its practices relating to  
the operating crafts or classes. And it was only in  
34 the afternoon of May 26th that we turned to the non-  
operating aspects of the case.

Mr. Devaney: Your Honor, I agree with what Mr. Shapiro says and this is what I stated earlier. The testimony concerning the operating unions came in over objection but I repeat again, and I don't believe Mr. Shapiro has indicated to the contrary, that there was never any attempt to name the operating unions along with the non-

operating unions as being parties against whom relief was being sought.

Mr. Shapiro: The United States—

Mr. Devaney: I was not aware until Mr. Shapiro made the statement this morning, I was not under the impression that Your Honor's Order was intended in anyway to apply to operating unions; and our Application was drawn with that in mind, that we did not intend our Application to make it applicable in any way to the operating unions.

Now, it's only because Mr. Shapiro persists in his view that some part of Your Honor's Order is applicable  
35 to the operating unions that I find myself unable to agree unequivocally that the Application does not apply to them.

Mr. Shapiro: Perhaps we could resolve it by stating that, if Mr. Devaney's Application is limited to the non-operating crafts or classes, we wouldn't take this as any concession on his part that Your Honor's Decree applies to the operating crafts. And for the purpose of this proceeding, we could go on.

I do point out that the operating unions did not need to be made parties. Neither did the non-operating unions need to intervene. This was a suit and is a suit by the United States to enforce the requirements of the Railway Labor Act.

The Court: Well, of course I understand that he doesn't make the concession that the operating unions were covered. And you don't make a concession that they were not.

Mr. Shapiro: That's right.

The Court: We can leave that in argument—I mean, in dispute but you are both agreed, it seems to me, that  
36 what this Application today is concerned with is entirely with the non-operating unions.

Now, what are the—they are in all seventeen non-operating organizations that are represented, that have contracts with—

Mr. Shapiro: I believe that is correct, Your Honor.

The Court: And eleven of those seventeen are on strike; is that right?

Mr. Shapiro: And the IARE, the International Association of Railway Employees, has a dispute with the Carrier as to whether or not it is operating or non-operating.

The Court: Well, all of these—the IARE is one of the seventeen, isn't it?

Mr. Shapiro: I believe that's right.

The Court: It's one of the seventeen organizations.

37 Mr. Devaney: Listed in the appendix, Your Honor; I believe it is. As I recall, there is one more listed in one of the groups than there are unions, because the—I believe it's the Redcaps and Porters are listed twice. This is my recollection. I believe that the list does include seventeen.

Mr. Shapiro: The reason for the listing was the Carrier's proposal of September 24, 1963, which I think was served on all of the listed organizations.

The Court: Well, I just—

Mr. Milledge: Judge, if I might say something in clarification.

The Court: Yes, sir. I just don't see that any of these matters dealt with—

Mr. Milledge: The operating crafts?

The Court: —the operating crafts.

Mr. Milledge: Well—

The Court: Any of the findings or—

38 Mr. Milledge: No, the only aspect, Your Honor, is this:

The Government's Complaint asked to have several actions taken by the Railroad enjoined. One of them—and they pertained—one was the September 24, 1963 Section 6 Notice. That pertained to all of the non-operating crafts.

There was a September 25, 1963 Notice that pertained to the operating crafts.

The Court: Yes, sir.

Mr. Milledge: So Your Honor made a ruling on that, that they couldn't put it into effect, which would also determine that the pre-strike agreements are still in effect.

Now, the operating crafts also have a dispute as to the September 25 Notice. The Government did not come in on the September 25 Notice, so that that dispute, that operating crafts' dispute, was not a part of this law suit. The Government came in on the Union Shop thing, which was a uniform notice to many non-ops and one op, the BRT;

so Your Honor made a ruling and it actually also  
39 affected the BRT although the same ruling had previously been made in the BRT case.

The third thing was the "Conditions of Employment" which was given to all crafts. And I would take it that Your Honor's Injunction on "Conditions of Employment" covered it for all employees.

Now, that doesn't have a negative side, that is, that didn't determine what contracts were in effect with the operating crafts.

I would say though that your Injunction did enjoin the Railroad from operating under the "Conditions of Employment" as to all employees. So, to that extent, the Injunction had a broad aspect. In other words, I would feel that if the Railroad put back the "Conditions of Employment" in, even to some operating crafts, that the Government would be entitled to come in on a contempt proceeding.

The Court: Under 1(c) of the—

Mr. Milledge: Yes, sir. So I think that—

The Court: That is the only ground of argument, as I understand it.

40 Mr. Milledge: Yes, sir.

The Court: Of dispute, is the scope of—

Mr. Milledge: 1(c).

The Court: —numbered Paragraph 1, sub (c) with reference to the "Conditions of Employment".

Mr. Milledge: 1(d) is actually the same, making individual agreements by—

The Court: Well, (c) and (d), then.

Mr. Shapiro: The exchange which occurred between Mr. Devaney and I, I've located it in the transcript, is at pages 84 through 87 of the transcript of May 26th, 1964. And we had an exchange concerning the examination of Mr. Wyckoff on the operating crafts or classes.

The Court: Mr. Devaney objected?

41 Mr. Shapiro: He objected.

The Court: And I permitted you to proceed.

Mr. Shapiro: You permitted me to proceed. I think your permission was qualified; yes, it was, at page 87, after having examined the third Count of the Complaint, which deals with the "Conditions of Employment", you said:

"Well, without accepting Mr. Shapiro's version of the scope of the third Count, I'm going to permit him to inquire along this line and the objection is overruled.

"I don't, by doing that, I mean to imply that I accept without reservation your estimate of the scope of the third Count."

And that was where we stood in the proof when I began to examine Mr. Wyckoff about the operating crafts or classes and the application of the "Conditions of Employment" of September 1, '63 to the operating crafts or classes.

42 That's the only way the operating crafts or classes came in, through the "Conditions of Employment" of September 1, '63, as applied to the ops' employment.

Mr. Milledge: If I may just wind up my little case here: We wouldn't have this problem if Mr. Devaney's Application had followed the Court of Appeals' opinion, which said a select item-by-item approach and saying what sections of what contract they would have difficulty with in following and what the results would be, and so forth, rather than this shotgun application.

Now, the last thing, Your Honor, is along this line, that this Carrier has shown a disinclination to follow any in-

junctions right along and they have shown a disinclination and we have a pending contempt action, and so forth.

It seems that this is certainly a circumstance when the Railroad comes in and, after nearly two years of operation, says that they are having difficulty complying with these contracts, their disinclination to follow the law or even to follow specific injunctions, should be a factor in weighing their request, the scope of any relief and the duration of that relief, if any.

43       The Court: I might like to hear you specifically, anything else you want to say in reply but specifically about the necessity for further consideration of your Application, No. 7 and 8. You can cover anything else you want to.

Mr. Devaney: Thank you, Your Honor.

The Court: In view of the contention that neither of those applications for modification relate to the operation of the Railroad.

Mr. Devaney: Well, to begin with, Your Honor, as to No. 7, which relates to the seniority rosters, this is the same sort of problem that we had in the Trainmen case. We have not since the beginning of this strike furnished for publication seniority rosters to any of the operating or non-operating unions, for the reason that the employees working during the strike were subjected to intense harassment, abuse, violence, and so forth.

Now, we asked in the Trainmen case that there be a provision on this and, right or wrong, when there was  
44       no specific ruling, we felt that it had not been determined.

Now, the same problem is presented here and we have presented the Application with full realization that, if we did not do so, we would face the same contention in this case that, because we hadn't made the Application and we were not furnishing the seniority rosters, we were in violation of the Order of the Court.



Now, the hearing before Your Honor on the 64-40 case has developed at considerable length what the Union's contention at any rate is as to the relationship of seniority rosters as a condition of employment; so that I don't believe we have to go into the detail of that and review it to be able to say without any question at all that it really is a part of the employment conditions that the parties must comply with, and the manner of complying with it therefore becomes a matter which we believe must be determined in this Application.

And because of the action which has taken place in the past, we have here, as we did in the Trainmen case, specifically asked that we be required to give the information only if there is a reasonably protective order that  
45 says that it will not be misused.

Now, as to the Union Shop provisions: It is not enough, Your Honor, that these people simply have a requirement in the agreement. If this were all that were involved, we would not have the concern as an employment condition about this Union Shop provision. But this goes much further than this, Your Honor. The present employees have in fact made application for membership in the Union. Not any of those people have been accepted for membership in the Union.

Now, does this mean, Your Honor, that every person must continue indefinitely going through the useless act of making application? Some of the Unions have even instructed people who have been expelled from the Union that you can make application every three months. Well, does this mean that every three months you go through the useless provision of making application, or are those people entitled at some point to be able to rely on the general and unflexible policy that not a one of them has been admitted to membership, that application forms have not even been provided in most instances, so that they will not have to  
46 make this request?

Now, the necessity for the request, Your Honor, has also been demonstrated in that the Unions—I don't know whether it applies to any of the non-operating unions or not, but they have similar provisions to the operating unions—and those Unions have clearly demonstrated that one of the techniques of enforcing or attempting to enforce the membership requirement against the people who are presently working is to say that, because you started to work after the strike began, you didn't make application within the thirty-day period, you can't now make application for membership in the Union. Therefore, we aren't going to consider your application. We are going to reject it on that ground.

And this is an attempt, Your Honor, to build up what we believe is a spurious justification for the denial of membership to these people on the asserted ground that "We are denying it because you didn't make the application within thirty days of your initial employment."

Now, for these reasons, we believe that it very clearly has an impact on their employment, not only now, Your  
 47 Honor, but it will have it in the future because, if these people have an obligation to continue to make application and if the Unions even though they are not willing to take any of them into the Union can in a year, six months, or an indefinite period in the future, come back and say those people must be discharged, this creates a claim, Your Honor. To say that it has, that it's merely a choice by the employer whether he's going to discharge these people simply isn't true, because if they contend and make the request for the discharge of a person, they can and will simultaneously file claims for monetary amounts of earnings on behalf of other people who would have been employed if the discharged non-member had been discharged in accordance with their claim. So this poses a matter which for an indefinite period will continue to present a problem to the Defendant and we feel that it is a very inseparable part of the conditions under which we must oper-

ate. And we believe that the Court of Appeals specifically decided that this kind of a limitation was the proper way to handle the Union Shop question.

48 In other words, yes, they have an obligation to become members, providing membership is available to them, and we are asking now for clarity, for understanding of not only the present employees but of the Defendant that the Union Shop provision either be void and unenforceable as to these new employees—and this would be on an individual Union basis, so that if any Union showed that it was offering or stood ready to offer membership, then these people would have to apply.

Now, if they are not willing to accept these people into membership, we merely say that they should not have the right to continue to insist that these people make these useless applications for membership, and have the right and the opportunity at some time in the future to attempt to have those people discharged and to attempt to bring claims against the Defendant for monetary amounts involving claims by others who would have had the jobs had the discharge been granted.

Now, if I may reply very briefly, Your Honor, to the statements that both Mr. Shapiro and Mr. Milledge made as to the breadth of and the shotgun approach or the lack of specificity in the Application, may I say that with  
49 respect to Item 1, which is the inability to observe the strict craft lines and seniority districts, that this is not a matter that would be uniform that we could say that any section of any particular agreement is the section that we are concerned about, and only those sections. Nor is it necessarily going to be the same from one day to another.

The necessity for crossing the craft lines is simply that we have at the present time fewer people available than we had before the strike, and that the people who are available are not the same individuals with the same qualifications that we had before.

Now, many of the people that we have are highly skilled individuals in certain operations but it does not necessarily mean that they are skilled in all of the operations of that particular craft. And this means, Your Honor, that when there are phases of the work that this person cannot perform, we have to use whatever person is available to perform it, even if it's a member of a different craft working alongside him to perform this particular operation.

50 The same is true of the use of the exempt and non-exempt supervisors. Since the strike began, as the work force has gradually increased and as the training has progressed, the amount of time that these individuals are spending in performance of scope work has diminished. In many instances, it has diminished very, very greatly but the fact remains, Your Honor, that so long as we do not have individuals who are fully qualified to perform all of the operations that there are many of the specific jobs that these people must perform, because they're the only people available who are qualified to perform it. And this goes to such matters as inspection, as to the performance of various other operations, where there is no one else other than the exempt or non-exempt supervisor who is capable and qualified to perform this work.

And again, this is not a matter that is going to remain uniform on a day-in day-out basis.

Now, as I stated earlier, the Defendant has, since it resumed operations on February 3rd, hired and trained employees as rapidly as it could do so in order to operate.

Now, we are fully prepared to show that we have not diminished our efforts in any respect.

51 Now, Mr. Shapiro made one statement with which

I agree and that is that the problems and the conditions under which the Defendant must operate include all of the things that have happened. We couldn't agree with him more on any statement than that. We believe this is true, and since the strike has occurred, a great many different things have occurred to create the strike conditions, to

create the problems as they exist today. For example, the Unions, as is their right during the period of the strike, have attempted to and have influenced and persuaded prospective employees not to come to work. They have handed handbills to people who would have been employees. They have used their efforts on other railroads to prevent or to discourage individuals who might otherwise have sought employment with the Florida East Coast not to work as non-union employees during the strike.

There have been these bombings and the many, many acts of sabotage which have most assuredly discouraged many employees who would otherwise have come to work for Florida East Coast.

There have been the campaigns nationwide on the  
52 part of the Unions that are on strike to pass out  
stickers to discourage people from shipping on the  
Florida East Coast.

There have been efforts on the part of the people within the State of Florida to call on every shipper not to ship by FEC.

There have been secondary boycotts to persuade users and shippers and receivers of freight that their employees should not—

Mr. Milledge: Excuse me.

Your Honor, are we going to have testimony on all this or is this some wild dissertation that we are never going to have any evidence about?

The Court: I'm a little in doubt. These aren't matters that are brought forward by the Application. I certainly am not prepared on this Application to try all these fringe matters going to what has happened. I know there's a strike and you don't have to put any evidence on to show there's a strike. Now, all of this other, I'm not prepared to hear evidence on and I don't see any useful purpose to be  
served by your making this statement about it, really.

53 Mr. Devaney: It goes to this effect, Your Honor,  
we do not intend to burden the record by attempting  
to prove these acts, but I merely say that—

Mr. Milledge: Well, what is the statement about?

Mr. Devaney: If you will be quiet, Mr. Milledge, I'm about to state what the purpose is, if you will bear with me and then make your objection.

Mr. Milledge: I move to have all of his remarks stricken as being matters on which he is not going to put on any proof, or matters of law either.

The Court: Well, he's about to come up, I think, with some reason. Let's hear what it is.

Mr. Devaney: Your Honor, I merely say that these conditions, all of the things that have occurred since the strike began, are a part of the strike conditions. They are part of the circumstances under which the Florida East Coast is attempting to operate, which is also its right to do.

54 Now, we believe that we have, since the Railroad began its operations on February 3rd, made every reasonable effort to hire and to train new people as rapidly as we can. We have done that since February of 1963 and we have continued to do that and we are continuing to do that today. But we do not agree with the proposition that when any Carrier operates under strike conditions that it is required to operate in precisely the same manner that it operated when there were not strike conditions. It simply is not possible to do so and we believe that even if it were not true that we had hired as rapidly as possible, that we had the right to operate and provide the service in an efficient a manner as we can during the existence of these strike conditions.

Now, this takes me to the four or five week suggestion by Mr. Shapiro. Now, the problem, Your Honor, is simply this: That these jobs, many of them, as has been conceded, represent skills and training available only in the railroad industry. Now, we could give many examples in both the shop crafts and in the clerk categories which would illustrate this very vividly, but I think the agreements  
55 themselves, which set up in the shop craft agreement the apprenticeship program of a four-year appren-

ticanship program, demonstrate better than I could say in many, many more words the period of training that is required. And as we shall show, the people who are journeymen have simply not been available and Mr. Shapiro concedes that it is virtually impossible for the Railroad to hire journeymen because this would mean people with railroad experience.

Now, to train people within this four-year period, to slot them in where their abilities and experience would justify putting them in the apprenticeship program, but you most assuredly can not train them, Your Honor, no matter how many you can hire, you simply cannot train them in a short period of time to perform this work and, until they are trained and until they are qualified, we simply cannot qualify under the strice provisions of the agreement with respect to these craft lines or to the exempt and non-exempt supervisors not performing some of the scope work.

Now, in the clerk category there are many of the employees, Your Honor, who require extensive training.

56 Now, we cited in the affidavit of Mr. Thornton, I believe, and perhaps Mr. Wyckoff, the Rate and Division Clerk as one of the examples that we are talking about in the clerk category. Now, a Rate and Division Clerk is, Your Honor, the person who takes the charges for carrying a boxcar or freight car and divides up among all of the railroads that have handled it for any part of its journey and apportions the amount of the total freight charge—

The Court: I know what it is.

Mr. Devaney: —to each of those railroads.

The Court: I know what a Rate Clerk is.

Mr. Devaney: Now, this requires, as Your Honor knows, an intimate knowledge of the various tariffs, the various routes, and it requires a long period, which our experience as well as the industry has indicated is two years to train these people.

Now, when the strike began, we had no Rate and Division Clerks. We took a supervisor at the beginning of



57 the strike who had been a Rate and Division Clerk and gave him the full-time job, which he is still performing on a full-time basis almost two years after the strike began, to train Rate and Division Clerks. And we hired three individuals for this position.

Now, this is the kind of problem that you face, Your Honor, in this training and this is what prevents the Railroad from complying immediately. It's what prevents and makes completely impossible the suggestion that Mr. Shapiro has made that there should be any time limitation of four or five weeks.

Now, we don't disagree, Your Honor, that, to the extent that we have the people available, we are continuing to hire and to train these people as rapidly as we can. We are not trying to evade our responsibility. We merely say that you can't comply with the agreement any more rapidly than you can train the number of people that you have available for this training purpose. And that the time, the ultimate time required, must depend upon the training and qualification of the people that you hire.

58 Now, Mr. Shapiro has again inferred that because we required after the strike a high school education that we have foreclosed our ability to hire people who could have performed these jobs but for the fact they did not have the high school education. Now, this inference is simply not correct. And Mr. Shapiro, if he wishes to pursue the matter, we will be glad to have him do so, but we have not been unable to hire people because of this educational requirement who would otherwise have been qualified for the job.

Our limitation, Your Honor, is now and has been, since we resumed operation, the fact that we can only train a limited number of people at any one time and still perform any of the service we are now performing to the public. This limitation has limited the number of people that we could train. It has limited the number of people we can train in the future. It must limit the number of people

that any employer can in any period of time qualify to perform jobs that are essentially skilled jobs.

We're not talking about jobs, Your Honor, that represent the unskilled or semi-skilled categories at this point.

We are primarily talking about the jobs which require a long period of training.

Now, I might also say that we fully recognize that the number of people that was estimated to be required, we simply, as Mr. Thornton indicated in his testimony in May, we simply estimated that we had X-number of people before the strike; we had Y-number of people now; that the difference was 600, and this was where the figure came in.

Now, we are fully prepared to show man-by-man what the actual number is and we are fully prepared to show why the 114 jobs were bulletined rather than a different number.

I merely mention that in passing, Your Honor, to indicate that we are fully aware of the fact that the estimate made back in May was simply an estimate based on what had existed before the strike and what we then had, without going into a consideration of the change in operation that had occurred since the strike actually began.

Now, I might say that, while we will go into it with evidence, Your Honor, a great many changes have occurred in this interim period with respect to new and different types of equipment, which we did not then have but which have since been received and is now in full operation. And this equipment has very drastically reduced the requirements of personnel in many of the categories that we previously had.

Now, this doesn't answer all the problems, Your Honor, because with it it often carries with it the requirement for additional people with particular training, which in effect was not a pre-existent skill at all. Certain opera-

tors are now required that were not used because the equipment did not previously exist.

Thank you very much.

The Court: Do I understand that everybody has agreed that there's no objection to granting the Application in 3 and 6 without any further testimony? Is that right?

Mr. Milledge: Which are they, Your Honor? The apprentice ratio one?

The Court: Apprentice ratio and the bridge tenders.

Mr. Milledge: On the bridge tender, I don't  
61 know why the people presently out there can't be operated under the contract.

The Court: All right, I'll require a showing.

Mr. Milledge: And also, on the seniority—

The Court: On 3, you have no objection? I take it there's no objection to 3?

Mr. Milledge: 3 is all right.

The Court: All right.

And despite the suggestion that 7 and 8 be stricken, that 1, 2, 4 and 5 are too vague to proceed on, I'm inclined to and will permit whatever showing the movant wants to make here this morning as to these others and deal with them after we have the evidence rather than in advance.

You may proceed.

There is no need to put any testimony on with respect to Item 3, as I understand it.

Mr. Devaney: Very well, Your Honor. We will  
62 not put any evidence on with respect to No. 3.

The Court: In other words, this would have the effect of, with respect to each of the contracts involved, of suspending the trainees' ratio and the age limitation contained in the agreement, so everybody will understand it.

Mr. Devaney: The first witness, Your Honor, will be Mr. I. E. Hamilton.

The Court: I didn't hear you.

Mr. Devaney: Mr. I. E. Hamilton.

**I. E. Hamilton.**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

**Direct Examination**

By Mr. Devaney:

Q. For the record, please state your name. A. I. E. Hamilton.

Q. And— A. I live at 725 Canal Street, New Smyrna Beach, Florida.

63 Q. And what is your position, Mr. Hamilton? A. I'm General Chairman of the Order of Railroad Telegraphers, Division 87, Florida East Coast Railroad.

Q. Now, you are the same person who previously testified in this proceeding in May; are you not, Mr. Hamilton? A. I believe about that time.

Mr. Devaney: Your Honor, I ask that this be marked for identification. I wonder if it wouldn't be simpler if we continue the numbering of the exhibits following the numbering in the original hearing?

The Court: That's quite all right; wherever you left off, on the—

Mr. Devaney: That's right.

The Court: —Application, you can start and pick up right there, Mr. Clerk. I think the Defendant Railway probably had letters.

Mr. Devaney: Yes. The last one, I believe, Your Honor, for the Defendant was the letter V, as in Victor, so  
64 this would be W.

The Court: All right: Identification W.

(The referenced instrument was marked Defendant's Identification Exhibit W.)

The Court: When you run out of the alphabet, start double A and double B, and so forth.

Mr. Devaney: Very good.

May this be marked as Identification Exhibit X.

(The referenced instrument was marked Defendant's Identification Exhibit X.)

By Mr. Devaney:

Q. Now, Mr. Hamilton, I show you this document, marked for identification as Defendant's Exhibit W, which is a letter, dated January 28, 1964.

Will you tell us by whom that letter is signed? A. It's signed by E. A. Armistead, General Secretary and Treasurer, Order of Railroad Telegraphers.

Q. And would you tell us whether or not this shows a copy of the letter to you? A. Yes, it does.

Q. Do you recall receiving that letter? A. At  
65 this late date, I would have to check my files. I'm not certain but I recognize that as an official letter.

Q. Would you examine the document, marked for identification as Defendant's Exhibit X.

For the record, that's a letter dated February 8, 1964, and it's addressed to Mr. C. C. Dempsey. A. That's right.

Q. And by whom is that letter signed? A. E. A. Armistead.

Q. And this shows a copy to you also; does it not? A. That's right.

Q. Now, Mr. Hamilton, I again hand you these two documents, marked for identification as Defendant's Exhibits W and X, and ask if they refresh your recollection as to the action taken by the organization with respect to those two individuals? A. Well, as I explained last May, we decided to wait until the strike was over before we took any action on these people.

Mr. Milledge: Excuse me.

Your Honor, I don't know that these have been offered. I want to object to them. May I make my objection now?

66       The Court: Well, I can understand your objection a little better if I have a chance to examine them myself. Until they are received, I think it's improper to examine the witnesses about them. If you want to examine the witness about them, they have been sufficiently identified. You may as well go on and offer them.

Mr. Devaney: Your Honor, I will offer these at this time as Defendant's Exhibits W and X.

The Court: All right, let me take the objection.

Mr. Milledge: I can explain my objection. I was hopeful that—

The Court: Excuse me just one minute, please.

Mr. Milledge: Yes, sir.

The Court: All right, sir.

67       Mr. Milledge: Our objection, Your Honor, is addressed to relevancy. To understand why these are completely irrelevant depends—they only have relevance in terms of Union Shop agreements. And the exhibit which was introduced prior, the Union Shop agreement, is not in the Courtroom right now but it will be in shortly. But the point is this, that this Union Shop agreement does not require membership. It only requires that a man make application within a particular period of time. If he makes application, it doesn't matter whether he's accepted or rejected. Under this agreement, he is entitled to continue his employment so, whether or not Unions take him or don't, is completely a matter of their choice. It doesn't have anything to do with the agreement itself.

The only provision in the agreement is that a man must make application within the requisite time. Now, he doesn't have to make it over and over again, as Mr. Devaney grossly misrepresented to the Court. The only thing that this agreement requires is that a man make application once to an organization national in scope. And it doesn't make a bit of difference to his employment rights as to whether he is or is not taken into membership. Each man

68 must make one application within, I think it's 60 days, and that's all there is to it.

So, whether or not the organization does take him in or not is totally irrelevant consideration here because Union membership is not required by the Union Shop agreement.

The only thing that is required is that a man make application, tender his dues, and so forth. But as far as the individual is concerned, he just has to make the application. So all this question about discrimination and so forth, they have the right to refuse these men if they've made their application within a certain period of time, but it does not affect the employment rights if application is made.

So all of this, this long business, we have been through it before but it's a misrepresentation of what's legally involved to say that Union membership is required. It's the application by a man within the prescribed time and, therefore, I object to all of this as being irrelevant.

The Court: Yes, sir.

69 Mr. Shapiro: I will join the objection and point out that, on any of these questions relating to the refusal of a Union presently on strike to accept a non-striking employee as a member during the period of the strike, the only relevant requirement is set forth in Section 2, Eleventh, of the Railway Labor Act, which expressly says that the agreement cannot—well, I'll read it:

"That no such agreement (Union Shop Agreement) shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments uniformly required as a condition of acquiring or retaining membership."



So that you take the agreement and you take the statute together, and it seems to me there is really no problem about discrimination or anything else. If the basic  
 70 steps have been complied with by the application for employment, if the Union refuses to receive him, then the Union refuses to receive him but the statute and the agreement govern and there is no need to pursue this line of testimony.

Mr. Devaney: Your Honor, I think that the objection is not well taken for several reasons:

In the first place, I agree completely with Mr. Shapiro that Section 2, Eleventh, by its provision says that an agreement cannot be enforced against any person against whom membership is not available on a uniform basis with all other people, but part of the problem here, Your Honor, is not merely that these people are not making applications but, as we shall show, this is only the first step in this procedure.

As we shall show, these people, as Mr. Milledge has just said, they assert that there's an affirmative obligation to make an application within 30 days or 60 days, whatever the agreement provides.

Now, when these people actually make application, they are not being furnished with application forms or they are being met with such provisions as an applica-  
 71 tion will be received only if it is signed by X-number of members of the Union in good standing; so that they are taking the position that because these people, because these hurdles are put up to the application actually being made, that these people because they did not then make the application, that they should be discharged.

See, they are trying to avoid, Your Honor, what Mr. Shapiro has very correctly referred to, that you cannot deny membership to a person unless you offer it to him on uniform terms, so they are trying to bypass that requirement by putting up the roadblocks and making it difficult,

if not virtually impossible, to make the application; and then saying, that because he has not done so, he has not complied with the provisions of the agreement requiring him to make application. They are piously saying that if he had only applied this would either have fulfilled his obligation under the contract or we would have admitted him to membership. They're saying, "We don't have to decide now which way we would have gone but he must only comply with that obligation."

72 So we say, Your Honor, that this whole matter cannot be sloughed off as being immaterial at this point, because we have the question of the ability of these people to make a normal application and have it either acted upon or rejected so that they then have some protection.

We merely ask that this be put in a form that is clear as to what the present employee must do.

Now, as to these specific letters, Your Honor, this witness testified on May 27th, he testified among other things that no individual who was a member of his Union had had any action taken against him, that everything was going to be deferred until after the strike was over. Now, these and other letters, Your Honor, indicate that action was taken. It indicates that this witness knew the action had been taken and that his prior testimony was not truthful. And we feel that we have the right to examine this witness on the basis of this evidence and establish that his prior testimony was not in accord with the facts—that he knew that action had been taken against various members or former members, and that this testimony to the contrary is not correct.

73 And we believe that all of this, Your Honor, carries over and is part of the over-all purpose and objective of the Unions here, not only to keep these people out of the Unions but it is to bypass and, under the guise of using the failure-to-apply argument,

attempt to by pass the provisions of the statute, which says that membership may not be denied.

This is why, Your Honor, we feel that it is material. It is why we feel that we must go into this matter. And it is why we feel it is a part of the conditions under which the Defendant and its employees must operate.

Mr. Milledge: Your Honor, this is a very involved area. If we are going to—its doesn't have—we have an Injunction which goes into effect tonight. There is no question but that no one is seeking to have any employees of the Railroad dismissed at the present time. Now, this is a complex matter.

As Your Honor recalls, for instance, the Railroad took the position since last July up until this Injunction was entered that the Union Shop provision was out the window anyway. So of course, if we are going to get into it at this time when it isn't a manpower question, naturally there's going to be all the testimony about what Mr.

Wyckoff told the people, they didn't have to apply;  
74 it's a very complex area. It's a matter for proof.

There is no reason at this time for Your Honor to be required to suspend or make any ruling one way or the other on it because this provision is not a self-executing one. The organizations must request dismissal and, if that is done at any time in the near future or at any time, then that will be a matter to be decided. But even if it's a matter that should be decided presently as opposed to some months from now, it's a vastly complex factual area which does not have any relationship to whether this—to any present man power requirements and I think we ought to have another hearing on it, if it's Your Honor's feeling that it should be resolved in this fashion; but it's a vastly complex matter which isn't presently in any critical stage.

Mr. Devaney: Your Honor, may I say in response to that that this merely bears out the contention that we made and our sincere belief that the Court of Appeals attempted

to deal with this without the necessity for all of the evidentiary matters, because none of them lead anywhere.

75 There is only one requirement that is involved here: If the Union has a Union Shop agreement and if it wants to enforce it, then it must make membership available to all the employees without discrimination. This is precisely what we believe the Fifth Circuit said in its opinion in the Trainmen case. And this is all that we are asking be included here, and it does not require a complex or lengthy evidentiary hearing to require what the statute already requires them to do.

We merely say that until they are willing to demonstrate that people who are working during the period of the strike are going to be admitted to membership that they simply not have the right to enforce their Union Shop agreement against those people.

Now, against their members who are already members, against anybody else who is accepted into membership, this would have no application whatever. We believe that this is the reasonable, the direct, the most logical way to deal with the problem, and this is why we have asked for it. And we believe that the Fifth Circuit intended that this be the way of dealing with the problem, without having to go into these lengthy evidentiary matters

76 which really do not take you anywhere anyway. The statute requires, in my judgment, that there be no discrimination and, if the Union wants to enforce that agreement, I see no reason why or how they could really object to a provision which says nothing more than the statute requires, namely, if you are going to enforce it, you must not discriminate against the people who are now working. And that's all we have asked.

The Court: I can't for the life of me see where this matter involves any man power question or any emergency strike condition that you need to ask at this time to have relieved. As is pointed out, if at any time there is the

claim that you are working a man in violation of the Union Shop agreement, there is a hearing, isn't there?

Mr. Devaney: Not necessarily, Your Honor. There would be a claim by—the normal procedure is to file a claim with the Company, which is progressed to the Adjustment Board, claiming wages which would have been earned by the person filing or on whose behalf the claim is filed, if the person in violation of the Union  
77 security agreement had been discharged in accordance with the Union's request.

Now, my point is simply this, Your Honor, that I don't contend—and I agree that this is not something that—

The Court: Well, the Court of Appeals has left you the right to come in on an item-by-item basis and say—

Mr. Devaney: That's right.

The Court: —and say, "We've got to be relieved in this particular or we can't operate, and it's brought on by strike conditions."

Mr. Devaney: That's right, Your Honor. And we say that, as to this, it is not of an emergency character that is going to require action today; but the same thing will be true tomorrow and tomorrow, as long as the strike conditions continue and as long as these people in fact trying to enforce that part of the agreement that requires that application be made within a specified time, and  
78 then are putting up roadblocks that make the application, so that later they are, and already have made the assertion, Your Honor, that they are asking the discharge and the claim will be on the basis not that membership was denied but rather that application was not made to the Union.

The Court: Well, these two apparently—

Mr. Devaney: These two—

The Court: These two that are offered here are returnees, not—

Mr. Devaney: They are returnees, Your Honor, and this goes more to the credibility of this witness than it does to

the second matter that I was reaching, namely, the question of the application. But I think that the question of the credibility of the witness whose prior testimony, beginning at page 484, 485 and 487 of the May hearing, he testified that no action had ever been taken by his organization against any member who had returned to work. He said on page 484, for example:

79 "It doesn't say that. He would later be given a chance to clear himself, or whatever is necessary. He will be given a fair and impartial investigation.

"In our case here, we are holding all of those in abeyance until the strike is over, and no decision has been made on them.

"Q. You mean you are going to try them after the strike is settled?

"A. No, I didn't say that."

And again he said:

"I said we are just leaving that matter in abeyance."

And this continues over and over that:

"No. we haven't taken any action against them."

When, in fact, they were returning their money as dues and telling them that they were no longer considered members.

Now, this is—

80 Mr. Milledge: That doesn't affect their employment rights. That wires them in for all time. It has nothing to do with our problem here.

The Court: I can't see that it does.

Mr. Devaney: Well, I don't say that it does have anything to do with the Application, Your Honor, but I do say that it has something to do with the credibility of the witness who testified that no action had ever been taken, when, in fact—

The Court: We are not going to relitigate this May matter and that's not the purpose of this hearing.

Mr. Devaney: No, it isn't, Your Honor.

The Court: You misconceive it to an extent, to my mind. What I have done in trying to follow what the Court of Appeals did in the Trainmen case is to say to you, "If the thing pinches too much, you've got a right to come in and show me on an item-by-item basis that it does so." Not to retry the whole proposition. I don't know why

I'm particularly interested now, having heard Mr. 81 Hamilton's testimony in May, in having his credibility attacked months after the hearing and thirty days after my Order based on the hearing. We would be here all winter on this thing.

The objection to these two exhibits is sustained. They are for identification only.

By Mr. Devaney:

Q. Mr. Hamilton, since you testified in May, have any of the employees presently working for Florida East Coast made application for membership in the Telegraphers Union? A. Let me explain it this way:

We have had some requests for application blanks.

Mr. Milledge: Excuse me, Mr. Hamilton.

Your Honor, this is—I don't know whether Your Honor meant to rule on the whole issue or not but this is, I think it's implicit in your ruling that the Union Shop question does not presently involve a man-power problem and consequently we would object to this whole inquiry, which does not have any present man-power impact whatsoever.

Mr. Shapiro: We join the objection, Your Honor.

82 It seems to me it has already been demonstrated by

Mr. Devaney's remarks that what's involved here is some sort of anticipatory ruling on what disputes might subsequently arise because someone files a claim against the Railroad, Your Honor.



There is a forum that has been provided for that and there's no reason why there should be any anticipatory ruling. This is not the kind of shoe which pinches the Railroad's operation and I don't think that is a line which can be pursued.

The Court: The objection is sustained.

Mr. Devaney: May I make a proffer of proof, Your Honor?

The Court: Well, if you will make it by a statement, rather than bringing it out question and answer with the witness.

Mr. Devaney: I understand, Your Honor.

The Court: Make a statement of what you seek to prove.

Mr. Devaney: May I inquire, before doing that,  
83 Your Honor, I assume that the ruling on this question of application and membership in the Telegrapher's Union, do you intend this to apply to all of the other Unions?

The Court: Yes, sir. Yes, sir, I would be glad to have that understood and it's almost to my mind, without saying definitely, that it does, it almost amounts to saying that I won't take any showing under your numbered 8. There may be—I say it almost amounts to that just simply to be cautious because there may be something under this 8, something else that could be shown, but this and similar testimony from this and other witnesses with respect to this and other crafts, I would object if it's proffered.

Maybe that takes care of your proffer, I don't know.

Mr. Devaney: No. The reason I asked, Your Honor, was whether I should limit the proffer to the Order of Railroad Telegraphers or whether it might save time if, in recognition of this, I made the proffer on behalf of the various organizations and tender the material in support of the proffer.

84 The Court: The ruling is down to cover it. The only difference, as far as I'm concerned at this point, is in the names of the organizations.

Mr. Devaney: That's correct.

May this be marked for identification as Defendant's Exhibit Y.

(The referenced material was marked Defendant's Identification Exhibit Y.)

Mr. Devaney: And this would be Z.

(The referenced material was marked Defendant's Identification Exhibit Z.)

Mr. Devaney: Your Honor, as soon as we get this one group of documents separated, I would like to proffer at this time Defendant's Exhibit Y, which consists of 61 letters of application to the various organizations.

Defendant's Exhibit Z consists of 6 additional letters of application.

We would show, if permitted to do so, that none of these individuals have been admitted to membership; that none of them have been furnished with applications for membership, with one or two possible exceptions, and the  
85 one or two exceptions where the individuals in fact made an application, that no action has been taken by the Local Union on the application.

Now, we offer these in support of the testimony, which was objected to and which Your Honor has sustained, dealing with the over-all question of the applications by the present employees for membership and the fact that they have not been granted membership in the Union and that their applications, or requests for applications, have not been granted.

Now, these Unions, the various letters include, if not all, certainly include most of the Unions involved in this action, including the Brotherhood of Railway and Steamship Clerks, the Carmen's Union, the IAM, the various other organizations, and including the Order of Railway Telegraphers.

I offer at this time Defendant's Exhibits Y and Z.

The Court: That's a part of the general proffer?

Mr. Devaney: Yes, it is, Your Honor. And I assume for the record you deny the proffer?

86 The Court: Well, I want you to complete your proffer.

Mr. Devaney: I have completed that part of the proffer, Your Honor.

The Court: It's excluded on the objections previously made and the previous ruling.

By Mr. Devaney:

Q. Mr. Hamilton, does your Constitution contain a provision in it for an application form?

Mr. Milledge: Excuse me.

I object, Your Honor; same objection. It's all the same area.

Mr. Devaney: Your Honor, this is not quite the same area.

The Court: All right, go ahead and complete your question and let me understand it.

Mr. Devaney: That question is complete but it does not go to the question that you had previously ruled upon.

There is another purpose.

87 The Court: I misunderstood you. I thought something was hanging up in the air.

Read the question please, Mr. Sheridan.

The Reporter: "Mr. Hamilton, does your Constitution contain a provision in it for an application form?"

The Witness: I know what you're getting at, Mr. Devaney.

The Court: Wait a minute. Wait a minute, Mr. Hamilton, I'm sorry.

The objection is sustained.

Mr. Devaney: May I say, Your Honor, that what we are leading up to, and I can ask a further series of questions but perhaps, if I state what the purpose is, you would reconsider your ruling and permit questions to go to this.

The Court: All right, go ahead.

88      Mr. Devaney: But the purpose of this, Your Honor, is that I wish to inquire as to whether or not the Order of Railroad Telegraphers has a provision in its Constitution for an application form.

Now, the individuals, or at least some individuals, who have made application to the Order of Railroad Telegraphers have not been furnished a form, but instead have been asked for a lot of detailed information. Now, we feel that this indicates, as we have contended all the way through, Your Honor, this is merely a subterfuge to obtain information for the harassment of the employees who are presently working and that this demonstrates again that the use of the names of the seniority rosters, and so forth, should be limited by Order of the Court to the proper and legitimate policing of collective bargaining agreements and not for the harassment of the present employees.

Now, this is the purpose of this line of inquiry, not the fact of membership itself.

Mr. Milledge: Your Honor, if I may be heard on this. This is a typical, ridiculous statement by Mr. Devaney.

89      The seniority rosters contain only two things: Names of people and their dates. They don't contain addresses or anything else.

All these people that his proffer shows, 60 odd, sent in an application, well that contains their name and I'm sure it contains their address and a lot of other information. So trying to go into this thing on the basis of seniority, what information might be on a seniority roster, is a fantastic representation to this Court, when a seniority roster, all it does, it has a man's name and his date.

The proposition that the seniority roster has something to do with harassing employees is just too ridiculous, and particularly going into it along this line. These people have already given their names, their names are the only thing that would be on the seniority roster anyway; so this inquiry must have—it doesn't have any relevant purpose in this proceeding.

The Court: I think I've already ruled on this point. Perhaps I should have ruled on your appeal to modify it, which is denied.

Mr. Shapiro: Pardon?

90 The Court: I say perhaps I did leave something open. I told Mr. Devaney that I would let him show me why the prior ruling should be modified. It's adhered to. I don't—there's nothing to be concerned about, Mr. Shapiro.

Mr. Milledge: The prior ruling is adhered to.

The Court: I'm just trying to make a clear record for Mr. Devaney on this line of proof.

Mr. Devaney: These, Your Honor, which I will have marked at Defendant's Exhibit—

The Clerk: AA.

Mr. Devaney: —AA, consist of a series of applications by individuals for application forms in the Order of Railroad Telegraphers.

We would show, first, that the application form is required by the Constitution of the Order of Railroad Telegraphers; that they have consistently used such an application form; that these employees presently working

91 for the Defendant made application for the employment form; that they were not furnished the application form but, instead, the Order of Railroad Telegraphers, by Mr. Hamilton, replied asking for information which is not normally required and which, under the Constitution, does not have any relevance to their membership at all, including such matters as the training they have had in the capacity of the job they are holding; that this information itself is a further attempt at avoidance by the Order of Railroad Telegraphers to provide the application form. It is a further attempt to harass these employees by requiring the divulgence of information which has not the slightest relevance to their application. It is the imposition of conditions which were never required of applicants in the past. And that this entire procedure is merely

another of the moves by the Unions to deny actual membership to these people, and that it further demonstrates that the use of information concerning the present employees is not desired for legitimate purposes but can only have an improper motivation behind it. And that this is why we have asked that the furnishing of any information

divulging the names of present employees be subject  
92 to this reasonable limitation that it not be misused.

Now, we would further show, Your Honor, as part of this offer that this use of this questioned reply has been broadened and is used by other Unions, including the Brotherhood of Railway and Steamship Clerks and is used by the Brotherhood of Railway Carmen of America, where the same questions, apparently a form letter approach is being used by all of the different non-operating unions as a basis for response to applications for membership; that this is not in accordance with the Constitutions of those or any organization; that each provides for the uniform membership application; that when it was requested by present employees, they were not furnished this membership application form but instead received this letter in the form of a questionnaire asking for additional information before they were even furnished the application form.

Now, if I may, Your Honor, these will consist of a series of letters, which I have only partly assembled for presentation. If I may pull them together and have them marked as AA or, if you would like, I will be glad to complete this assembling at this time.

93 Would you like that I go ahead now or should I proceed and assemble these and give them to the Clerk when we break for lunch?

The Court: Well, whatever you want included in the proffer, why you'd better get it to him some time. I'm going to exclude it whenever you get it ready; it's excluded.

Mr. Devaney: I understand.

The Court: You put it in whatever form you want, whatever is the most convenient and the most time-saving at this point.

Mr. Devaney: All right.

As merely suggesting—would there be any objection to my doing this, getting these altogether when we break for lunch?

The Court: I think you have indicated the general nature of them and—

Mr. Devaney: Correct.

94 The Court: —you can certainly put them in form and the Clerk can mark them for identification during the noon recess.

I gather, as you go along, that this is beamed primarily at numbered Paragraph 8, which extends over or slops over into 7 occasionally.

Mr. Devaney: That's correct, Your Honor; that's quite correct.

The Court: It directly or indirectly is intended to support the Application in No. 7.

Mr. Devaney: That's correct, Your Honor.

By Mr. Devaney:

Q. Mr. Hamilton, have you called on shippers of freight on the FEC to cease doing so during the period of the strike?

Mr. Milledge: Excuse me. I object.

If he had done it, it would just mean that they could then use less man power. It would really help them in  
95 this proceeding, but I—that's frivolous but I do object. It doesn't have anything to do with the man power to handle the present freight.

The Court: What's the purpose of this, Mr. Devaney?

Mr. Devaney: This is part of the establishment of the employment conditions, Your Honor, that Florida East Coast is now operating under. I think it goes to the question that the Unions have exercised every means they could



to discourage shippers using Florida East Coast, to discourage employees making application; but these are part of the strike conditions under which we are now working and it's part of the problem that we face and why we cannot operate in the same manner today in all respects that we could prior to the strike.

It means that it clamps down on the number of applicants that we have. It means that a great deal of the shipping which would otherwise be available to Florida East Coast is not available to us because this action is taken against the Florida East Coast.

The Court: Objection sustained.

96 Mr. Devaney: No further questions of this witness, Your Honor.

Mr. Milledge: No questions.

Mr. Shapiro: No questions.

The Court: Come down, Mr. Hamilton.

(Witness excused)

The Court: As far as I'm concerned and the record may show that, if other Local Chairmen or responsible heads of these labor organizations were called and you sought to elicit the same proof from them that you did from Mr. Hamilton, I would make a similar ruling. I hope that is broad enough to save going through any further steps along this line.

Mr. Devaney: All right, very well. I think that will certainly cover that.

Do you wish to call another witness or adjourn for lunch at this time, Your Honor?

The Court: Well, I'm prepared to proceed for a few minutes.

97 Mr. Devaney: Very well.

The Court: I will want to stop in a few minutes.

Mr. Devaney: Mr. Webb.

**Howard E. Webb.**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. Would you state your name, please. A. Howard E. Webb.

Q. And by whom are you employed, Mr. Webb? A. Florida East Coast Railway.

Q. And what is your position? A. Superintendent of Communications and Signals.

Q. And how long have you been employed by the Florida East Coast? A. A little over a year.

Q. And by whom were you employed prior to that time? A. Louisville and Nashville Railroad.

Q. In an equivalent capacity? A. Yes, sir.

98 Mr. Devaney: I ask that this be marked for identification as Defendant's Exhibit BB.

(The referenced material was marked Defendant's Identification Exhibit BB.)

**By Mr. Devaney:**

Q. Mr. Webb, I hand you the document marked for identification as Defendant's Exhibit BB. Would you tell me what the headings on this document, marked for identification, state and what these various headings purport to show?

Mr. Milledge: Objection. There is no way for us to know even what we are dealing with here. Either the document is admitted or it is identified admitted or—

The Court: Well, what is it? Some kind of a chart?

Mr. Devaney: Yes, Your Honor.

The Court: Sir?

Mr. Devaney: It is a breakdown of employees, that's correct. If you want me to identify it, I'll be happy to.

99       The Court: Well, I'm sorry. Let the witness go on and identify it sufficiently to identify what it is and then make a tender, so that he can examine it to see if there is any objection.

The Witness: This shows the pre-strike freight and passenger employees; passenger employees only; freight employees only; in manufacturing of bearings; employees in freight only, on November 2nd, 1964; the number of bulletined positions, November 2nd and November 3rd, 1964; the reduction of requirements; additional needed—if first bulletined filled or perishable season; total now and bulletined or to be bulletined.

By Mr. Devaney:

Q. And the column on the left indicates the different departments of the Florida East Coast, does it not? A. That is correct.

Q. And is the third one the department which you are in charge of? A. Yes, sir.

Q. That is the Communications and Signals Department? A. Yes, sir.

Q. Now, were the figures as to that department  
100   prepared by you or under your direct supervision?

A. Under my supervision.

Q. Now, as to the other departments, do you have any first-hand knowledge of the preparation of those items, or were those prepared by other persons? A. I have no knowledge of how they were prepared, or prepared by other people.

Q. In other words, you are familiar with those figures relating to the Communications and Signals Department? A. That is correct.

Q. Now, Mr. Webb, as—and I believe that the date here is December 31, 1962. Could you tell us how you determined the number of employees in the Communications and Signals Department prior to the strike, as of December 31,

1962? A. We obtained the payrolls from the Accounting Department and took that from the actual time sheets.

Q. Now, I noticed that there were no employees in the Communications and Signals Department allocable to passenger business; is that correct? A. It's so indicated on this chart.

Q. And why was that, Mr. Webb? A. Well, they  
101 serve for both freight and passenger. It would be difficult to separate to which department or which service that they tendered their services to.

Q. How many—

Mr. Shapiro: Your Honor, I object at this time to the line of questioning.

Has this been introduced in evidence yet?

The Court: No. it hasn't been tendered yet. I think he was simply trying to establish the authenticity of it and, as I understand it, it's a chart made up in part from some figures supplied by this witness.

Mr. Devaney: This is correct, Your Honor.

The Court: Well, show it to counsel. Maybe they would agree with you as to the correctness of it. Apparently you are going to have to call somebody from each of the operating departments to prove the validity of its, unless you—

Mr. Devaney: That is correct, Your Honor.

The Court: —can agree on it. I don't know; may-  
102 be you can work out an agreement.

The purpose of it is to contrast pre-strike and present numbers of employees; isn't that it?

Mr. Devaney: That is correct, Your Honor.

The Court: In each of the operating departments?

Mr. Devaney: That is correct.

If you care to look at a copy of it, Your Honor, I have an extra copy. (Tendering instrument to the Court)

The Court: Thank you.

Mr. Milledge: Judge, if I might make a suggestion.

The Court: Yes, sir.

Mr. Milledge: I have most of the General Chairmen of the organizations here. Of course, I don't have any independent knowledge but they could, particularly if we had a few more copies of it.

103 The Court: Yes, sir. I think that you might be prepared to stipulate that—

Mr. Milledge: Yes, sir.

The Court: —that the other department heads would give testimony similar to that of Mr. Webb with respect to the authenticity—the accuracy, rather, not the authenticity but the accuracy of the figures and their source, being original business records of the Company. There are eight departments that you would have to have similar testimony from, since it's a kind of composite exhibit.

Maybe you can talk to your people at noon and be prepared to take a position on the matter.

Mr. Milledge: Yes, sir.

The Court: I think you would represent that—

Mr. Devaney: Indeed so.

The Court: —you've got other people here who would testify to the correctness of the figures?

104 Mr. Devaney: Department by department.

The Court: Yes, sir.

Mr. Devaney: It would be established by other witnesses that this is the person who has the direct—

The Court: Well, I sure hope we can avoid that. Maybe you can talk to your people. And it may be a good place to break off.

Mr. Milledge: Your Honor, if we could do this just so I understand, just by way of voir dire, if I might ask this witness—

The Court: All right.

Mr. Milledge: —what the different headings mean, so I'm clear in my own mind.

The Court: All right, certainly. I think that may save some time.

## 105 Voir Dire Examination

By Mr. Milledge:

Q. Your first column over here at the top, "Pre-Strike Freight & Passenger", the numbers are the numbers of men, scope— A. Employees.

Q. Scope employees? Is it scope or non— A. Scope employees.

Q. Does that include supervisors or not? A. No supervision.

Q. Does that figure include non-exempt foremen, that is— A. No, let me testify to this extent, that the non-exempt foremen—you mean like a foreman of a gang?

Q. Correct. A. That includes those.

The Court: Like a foreman, what, Mr. Webb?

The Witness: Of a gang.

By Mr. Milledge:

Q. That is, he is still a Union man but— A. He's still a Union man.

Q. —but he's in a supervisory role. All right, it includes those people? A. (Nodding head in the affirmative)

Q. What is this third column—or fourth column, "Mfg. Bearings"? I didn't catch that. That's not your department? A. No, it's not my department but I would assume that was people that worked on the bearings of cars and such.

Q. Now, these first four columns are all the date December 31, 1962? A. Yes.

Q. The fifth column is a fairly recent date? A. Yes, November 2nd, '64.

Q. All right. The next column is what? The number of jobs bulletined on that date? A. That's correct.

Q. Then your next column is "Reduction of Requirements". What does that mean? A. That means the number of—in other words, these positions bulletined would

bring us up to what we consider our requirements. Your reduction of requirements is the number of employees.

Let me explain that again: That is the difference between—or the number of jobs that would be reduced  
107 below what we had prior to the strike.

Q. In other words, that column that ends up “317”, that’s 317 less men— A. Less employees.

Q. —than in the pre-strike circumstance? A. That’s correct.

Q. Now, let me just go back a second to that “Bulletin”. That’s the sixth column.

Are those jobs that were bulletined in addition to Column No. 5? In other words, you show 11/2/64 column— A. That a certain number of positions were bulletined.

Q. Yes, let’s just— A. I mean 5 is the number of employees on 11/2/64.

Now, you want the—

Q. Is 6 the jobs that— A. The positions that were bulletined.

Q. Well, do those include some of those in 5, or are they all new positions? A. Those are all new positions.

Q. Now, what is that eighth column, entitled “Additional Needed”? What does that have to do with it? Do you know? A. I assume that is if during the perishable season and if the bulletins—the first bulletins, those covered  
108 by the sixth column—were filled, the additional positions would be bulletined as shown in the eighth column.

Q. So your understanding of the eighth column is additional personnel needed for the perishable season? A. Yes.

Q. And what is the ninth column a total of? A. That shows the number that have been, that are now bulletined or will be bulletined.

Q. It looks like—is it a total of columns 6, 7 and 9—5, 6 and 8, rather? Is that what that is? A. Which ones did you say?

Oh, that is a total now, that is the total of 5, 6 and 11— I mean, 8, rather; it’s 11 men there.



Mr. Milledge: I think I can interpret it now, Your Honor.

The Court: All right. This may be a good point to break off.

Mr. Devaney: Your Honor, before we do, may I take about two minutes and, strictly for the record for identification, read the letters that constitute Defendant's proffer of AA?

The first is a letter dated November 21, 1964,  
109 addressed to Mr. Lige Murray.

The Court: Unless you insist on it, I don't know of any reason.

Mr. Devaney: Well, the only reason is that they are loose and there are several letters and I thought perhaps the parties, for ease of being able to identify the contents of the exhibits, that it would be helpful to them, Your Honor. Otherwise, I will not do so.

The Court: Well, rather than read them in the record, I suppose you have somebody over there in the office who can list the letters; just list them and attach a list of them to the exhibit.

Mr. Devaney: Yes, that can be done, Your Honor.

The Court: All right. I just hate to take the time while you read all those named.

Mr. Devaney: All right, we will do that.

The Court: I have another matter to take up for  
110 about five minutes at 2:00 o'clock, so let's say 2:10, Gentlemen.

Mr. Devaney: Very well.

(... At 12:35 o'clock p.m., on Monday, November 30, 1964, the Court adjourned to be reconvened at 2:10 o'clock p.m.)

(... At 2:25 o'clock p.m., on Monday, November 30, 1964, pursuant to adjournment of the preceding session, Court reconvened and the following further proceedings were had:)

**Howard E. Webb.**

resumed the witness stand and further testified as follows:

The Court: Gentlemen, have you reached some agreement about this exhibit?

Mr. Shapiro: Your Honor, the Government feels, first, that this should properly be introduced by the official who prepared it; secondly, that insofar as the figures represent the personnel situation in the several departments of the Railroad, that they should be explained by the  
111 department heads. There is no way we can cross-examine these statistics or know what underlies them. We just don't have access to that kind of information and, without the department heads available to tell us what they mean and why they are what they are, I don't see how we can proceed with it.

The Court: Well—

Mr. Milledge: Our position is the same.

In and of themselves, these figures don't say anything in regard to these specific problems before the Court. And they only say something in terms of what's represented to be the problem in the particular department, and each department is extremely different.

The Court: Well, I hope I may understand that neither you nor Mr. Shapiro object to stipulating that we have—that the Defendant-Movant has the appropriate heads or sub-heads, of the seven or eight departments here, prepared to testify to the correctness of the figures in the same way that Mr. Webb has, and we can save that.

112 Now, if they are here and remain here and Mr.

Shapiro and you will call for individual ones that you want to cross-examine about these figures, I think that might save us some time.

Mr. Shapiro: I think, on that condition, the Government could accept this.

The Court: If you will just keep them here, please, sir, and—

Mr. Devaney: We will do that.

The Court: I'm going to receive the proffered exhibit as BB in evidence. It may very well be, as you suggest, that it means nothing without some explanation; that, I don't know. Maybe it can be made clear, with one man testifying about it.

This is all kind of, particularly in Mr. Wyckoff's sphere or his department.

Mr. Shapiro: I would like to ask—

The Court: Maybe Mr. Wyckoff could cover the  
113 whole thing, rather than cross-examining each one of these. I don't know, but, anyhow, the paper, for what it is worth, is received as to the whole thing; and unless they are called for specifically, I don't require that you produce each of the several department heads. If they are called for to be examined about something on the exhibit, why we will permit that to be done.

Mr. Devaney: Very well, Your Honor.

Mr. Milledge: Is it represented that each of the department heads is here?

The Court: That's what I understood, that they were either here or available.

Mr. Devaney: We have individuals here who have the knowledge and information.

The Court: Why don't we just go down this list and I'll make a note on this extra copy I have.

The Motive Power Department?

Mr. Devaney: Mr. Hales is here.

114 The Court: All right, sir.

Maintenance of Way?

Mr. Devaney: Maintenance of Way, Mr. Davidson is here.

The Court: We have Mr. Webb on for Communications & Signals.

Mr. Devaney: Correct.

The Court: He's on the stand now.

Transportation?

Mr. Devaney: Transportation Department, that would be handled by Mr. Thornton and Mr. Wyckoff.

The Court: A little louder.

Mr. Devaney: Mr. Thornton and Mr. Wyckoff would cover the Transportation Department.

The Court: I see.

Mr. Devaney: The Accounting Department, Mr. Wyckoff.

115 The Freight Traffic Department, Mr. Thornton.  
The Personnel Department, Mr. Wyckoff.

The Stores Department, Mr. Hales.

The Court: Hayes?

Mr. Devaney: Hales, H-a-l-e-s.

The Court: The same man?

Mr. Devaney: Yes, Your Honor.

The Court: All right, sir.

Mr. Shapiro: Your Honor, I wonder if I might ask Mr. Webb one or two questions?

The Court: Certainly; if you are finished with him on direct.

Mr. Devaney: I have not, Your Honor.

The Court: All right, why don't you save that.

116 Mr. Devaney: If you have some on voir dire, you may go ahead.

Mr. Shapiro: This is really only as to the preparation of the document.

The Court: All right, let's take it now then in connection with the exhibit.

### Voir Dire Examination

By Mr. Shapiro:

Q. Mr. Webb, did you prepare this document? A. Only my portion of it, or furnished the information which was used in the preparation of it.

Q. To whom did you furnish that information? A. The Director of Personnel, Mr. Wyckoff.

Q. Did Mr. Wyckoff prepare the document as a whole?  
 A. I assume he did; I can't answer that question.

The Court: He got your part of it from you?

The Witness: That's right.

By Mr. Shapiro:

Q. And the figures that you have come from the payroll records of your department? A. That is correct.

117 Q. Do you maintain the payroll records for your department? A. No, the Accounting Department maintains the records but we can secure the records from them any time we need them.

Q. Were the statistics that are on here furnished you by the Accounting Department? A. They furnished us the time rolls and we took the figures off of them.

Q. You examined the records of the Accounting Department? A. I examined the records and got those figures that appear on there.

Q. I see; thank you. A. Yes, sir.

(. . . Thereupon, Defendant's Identification Exhibit BB was received and filed in evidence.)

Mr. Devaney: Your Honor, I have prepared, as suggested, a list of the letters constituting Defendant's Exhibit Z and Defendant's Exhibit AA, which I ask the Clerk to attach to each of those exhibits.

The Court: All right, sir.

118 Mr. Devaney: To complete the—

The Court: Did you make an extra copy of that by any chance? Do you have an extra copy?

Mr. Devaney: An extra copy of that? I believe I have.

The Court: I was going to suggest that maybe you deliver that to Mr. Shapiro. Then he will have a record of exactly what's in the exhibits.

Mr. Devaney: I believe I do have one extra copy, Your Honor.

The Court: All right.

Mr. Devaney: To complete the proffer relating to the same matters, I have noticed that there were three items which were not previously included in the proffer and I would like to have them marked for identification at this time as Defendant's Exhibit CC.

(. . . The referenced material was marked Defendant's Identification Exhibit CC.)

Mr. Devaney: This is a letter, dated November 18, 1964, and it is a letter from the Brotherhood of Railway  
119 and Steamship Clerks addressed to Mr. M. R. Keefe, in which the Brotherhood of Railway and Steamship Clerks ask for this information in letter form. He responded to this.

And we would further show that Mr. Keefe's application was neither granted nor was he furnished an official application form.

I would like to have marked for identification as Defendant's Exhibit DD a letter, dated October 29, 1964, and attached to that—this is addressed to Lloyd G. Taylor from Mr. John H. Hornsby, Sr., and it is addressed to the International Association of Machinists, and attached to that is an application form. Now, the International Association of Machinists did furnish an application to this individual. He submitted it and has not been admitted to the Union.

(. . . The referenced material was marked Defendant's Identification Exhibit DD.)

Mr. Devaney: And I would like to have marked for identification as Defendant's Exhibit EE a letter to Mr. D. S. Cooper, Financial Secretary-Treasurer of the Brotherhood  
120 of Railway Clerks. The first letter is dated November 16 and is from Anna M. Wright. Prior to that is a letter of August 14 from Mr. Cooper to Anna M. Wright; a letter of July 24 to Mr. Cooper from Anna Wright; a letter of April 13, 1964 to Anna M. Wright from Mr. Cooper; a letter of March 16, 1964 to Mr. Cooper from

Anna M. Wright; a letter of March 6, 1964 to Miss Anna M. Wright from Mr. Cooper; a letter of March 3, 1964 to Mr. Cooper from Anna M. Wright; a letter of February 18, 1964 to Anna Wright from Mr. Cooper; a letter of September 13, 1963 to Anna M. Wright from Mr. Cooper; a letter of August 19, 1963 to Mrs. Scanlon, Recording Secretary, Care of Mr. Cooper, from Anna M. Wright; a letter of August 12, 1963 to Miss Anna Wright from Miss Scanlon, and a letter of August 8, 1963 addressed to Mr. R. W. Hayes, President of Lodge No. 751, signed by E. W. Pollard. All of these constitute for identification Defendant's Exhibit EE.

These are all letters going from the original expulsion of Anna Wright through a whole series of applications for reinstatement. And we would show, Your Honor, that she was rejected for reinstatement on each occasion.

And in accordance with the provisions of the Constitution of the Brotherhood of Railway Clerks, she has periodically, I believe every three months, applied for readmission and she has not been readmitted.

I offer the exhibits marked as DD, CC and EE into evidence.

The Court: This is an addition to the earlier proffer, and they are excluded under the prior ruling.

By Mr. Devaney:

Q. Now, Mr. Webb, on Exhibit, Defendant's Exhibit BB, do you have a copy of that before you? A. No, sir.

Mr. Devaney: May I have that again, please?

(The Clerk tendering instrument to Mr. Devaney)

By Mr. Devaney:

Q. Now, do I understand that, as of November 2nd, 1964, you then had 11 employees in your department? A. Yes, sir.

Q. Did you bulletin an additional 7 jobs? A. That's correct.



Q. And that makes a total of 18 in the last column? A. That's correct.

122 Q. Now, you have indicated that you have had a reduction of requirements of 35? A. Yes, sir.

Q. Now, could you tell us some of the reasons for the reduction in the requirements of the people in the Communications and Signals Department? A. The efficient use of new machinery, new equipment, such as "hi-rail" cars, new circuit design and electronic equipment, the change-over of a 4400 volt line to 220 volts.

Q. Now, Mr. Webb, for my edification, what relationship does the 4400 volt line have to do with how many people you have to have in your department? A. The equipment associated with it requires considerable personnel to maintain.

Q. What— A. It's subject to lightning and there's old substation equipment that was antiquated that required considerable looking after.

Q. What sort of equipment was this primarily? A. This was all electrical equipment.

Q. I mean, what sort of equipment? A. Relays, transformers, fuses, circuit breakers.

Q. And before with the 4400 volts, you had to have such things as transformers and circuit breakers and  
123 relays? A. Yes, sir.

Q. You don't need those anymore; is that correct? A. That is correct. We stepped the 4400 down to a lower voltage and they are not required.

Q. Now, does this reduce the volume of maintenance that you previously had? A. Yes, sir.

Q. Now, in addition, you mentioned the "hi-rail" car. How does this affect the number of people in the department, Mr. Webb? A. Well, this lets us have a more mobile way of moving about over a territory. We are not interfered with trains, or if a train is in the way, we can take to the highway. It lets us practically carry the tool-house on our truck. In other words, we have everything with us.

There's radio equipment to permit the contact with the dispatcher, to be notified as to when there is trouble and where the trouble is at, and to obtain information on the trains.

Q. Now, prior to the utilization of these "hi-rail", this "hi-rail" equipment, did you have any way of directing the maintainers by radio? A. Not necessarily.

124 Q. How were they contacted? A. Usually by 'phone to the dispatcher. They would contact the dispatcher or the dispatcher would contact them through an operator at home.

Q. But during the course of the day when they were working, there was no direct communication with them; is that correct? A. That's correct.

Q. Now, you joined the Florida East Coast—what was the date again? September of '63? A. September 16, 1963.

Q. Now, what steps have been taken since you joined the Florida East Coast with regard to obtaining employees in the Communications and Signals Department? A. Well, we have accepted applications and interviewed people and have selected those that we considered best qualified to become signal employees.

Q. Have these people, Mr. Webb, been fully qualified to perform the work in this department? A. Not entirely.

Q. Have they had to undergo training of some sort? A. Yes, sir.

Q. How long a period of training has been required before these people were qualified? A. Well it would  
125 take at least four years to make them completely qualified.

Q. Now, how many supervisors are available in your department that can perform and/or train these new employees? A. Four.

Q. And you have at the present time 11 people who are in the process, some stage of training? A. Yes, sir.

Q. How many additional people can you accommodate in this training program with the number of supervisors you currently have? A. Well, we could add seven.

Q. And these were the jobs that you bulletined? A. Yes, sir.

Q. And how many responses did you receive to those bulletined positions? A. None.

Q. Now, prior, even prior to the bulletining, did you have vacancies, or were you attempting to fill vacancies that you had in your department? A. Yes, sir.

Q. Were you successful? A. No, sir.

Q. Now, with the 11 that you have and the 7 positions that you bulletined, Mr. Webb, would this have permitted you to comply fully with the agreement that existed before the strike? A. No, sir.

Q. In what way would you not have been able to, with the total of 18 now, if you had got all 18—the 7 you bulletined and the 11 you already had? A. We would still have to have our supervisory personnel assist these men with the work that they would be performing in order to train them.

Q. And what is the reason for this, Mr. Webb? A. Well, it's the lack of qualified employees and the number of—limited number of supervisory personnel to instruct and train these men.

Q. Now, except for their limitation and knowledge or qualifications, would the 18 people have given you enough scope people to perform the work once they were fully qualified? A. Yes, sir.

Q. Now, at the present time, are you continuing to use your supervisors to perform part of this work? A. Yes, sir, we are.

Q. Now, if you were not able to continue to use the supervisors in this manner, would this have any effect on the operation of your department? A. I'm afraid this would permit the signal system to run

down considerably and not meet the Interstate Commerce Commission's requirements.

Q. Would this have any effect on the operation of the Florida East Coast? A. It would certainly hinder operations to a great extent, probably cease.

Q. Now, before the strike, Mr. Webb, was some of the CTC equipment; that is in your department, is it not? A. Yes, sir, it is.

Q. Prior to the strike, was some of the installation being done by Florida East Coast employees? A. Yes, sir, it was.

Q. What was the situation when you joined Florida East Coast on September 16, 1963? A. The installation of CTC was being performed by contractors.

Q. Why was it being performed by contractors? A. The lack of qualified FEC employees to perform the work.

Q. Now, is the contracting out of this installation of CTC continuing at the present time? A. Yes, sir, it is.

Q. And why are you continuing to contract out  
128 that work? A. The lack of qualified employees of our own to perform the work.

Q. Has the installation of CTC itself had any impact on the number of people you will require in the future? A. Yes, sir, I believe it has.

Q. In what way? A. Well, we have reduced the amount of equipment to be maintained by a reduction of signals and the type of equipment being installed, elimination of insulated joints and similar materials.

Q. What do you mean by an insulated joint, Mr. Webb? A. It is an insulation between two rails to separate circuits, electrical circuits.

Q. And do these joints require a particularly high degree of maintenance? A. In order to keep a signal system functioning properly, they require considerable maintenance.

Q. Now, how are you, by installing CTC, reducing the amount of maintenance that's attributable to these insulated joints? A. By extending the—by the newer type

track circuits, we are able to extend their length to a greater degree than you can with conventional circuits, which eliminates the number of joints installed; also the use of electronic track circuits for our operation at crossing protection reduces the number of insulated joints.

Q. What do you mean by electronic track circuits? I don't quite follow you on that. A. This is a circuit that you might say of a radio frequency or in the range of 1000 or 1.0 kilocycles to 8.0 kilocycles.

Q. And you are transmitting that by radio? A. Through the rails.

Q. Oh, through the rails? A. Through the rails.

Q. How were the signals previously activated? By having a line? A. No, through a combination of line wire and DC or direct current operated track circuits.

Q. Could you give us some idea of what sort of jobs these seven were that you bulletined, Mr. Webb? A. Well, one was a maintainer, a foreman, and three signal men and a couple of helpers, I believe it was.

Mr. Devaney: I have no further questions, Your Honor.

#### Cross Examination

By Mr. Shapiro:

130 Q. Mr. Webb, where did the four supervisors in your department come from? A. I assume, once upon a time, they may have been signal helpers, assistant maintainers, foremen.

Q. Were they employees of Florida East Coast? A. They were employees, former employees—or they are still employees of the Florida East Coast but probably under the scope.

Q. Were they there when you came? A. Yes, sir.

Q. How were you recruited? A. I was approached. They called me on the telephone and talked to me.

Q. Who did that? A. The Assistant Chief Engineer.

Q. Have you ever called anyone on the 'phone to invite them to work for the Carrier? A. I think I have, either once or twice.

Q. Do you know whether the Assistant Chief Engineer has attempted—do you know whether the Assistant Chief Engineer or any other officer of the Railroad has done this on behalf of your department? A. No, I'm not familiar if they have.

Q. What has the average size of the staff in your  
131 department been in the last year? A. Well, it has varied. You mean, within, including the scope people?

Q. Yes, sir, the over-all staff of your department? A. Well, it has—when I first came there, it was possibly three or four; I can't state specifically. It has varied from that point up to our present status, as shown on the exhibit, eleven.

Q. So there have been no reductions in your department? A. No, sir.

Q. Can your new equipment be operated by the present staff? A. Not entirely.

Q. How do you propose to operate it? A. The use of supervisory personnel.

Q. If the strike were to end and the former—I shouldn't say "former" but the striking employees were to return to work, would they be able to operate the new equipment? A. I think they also would need training.

Q. So that the problem in the use of supervisory personnel is in large part attributable to new equipment? A. Partially, yes, sir.

Q. Have you interviewed applicants for your de-  
132 partment? A. Yes, sir.

Q. How many have you interviewed in the last year? A. Oh, maybe—I couldn't state specifically. If I may guess, I would say maybe up to fifteen.

Q. Up to fifteen? A. Yes.

Q. Has there been any difficulty in getting applicants to come to apply to your department? A. Well, there was—we had applications but the qualifications were the main problem.

Q. What does a Communications and Signals supervisor do? A. He supervises the maintenance, installation and inspection of signals and communications installation.

Q. What is his specialty? Electrician? Is he a radio man, telephone man, or can you describe him in some detail? A. He is a composite mechanic.

Q. A composite mechanic? What kind of background does a man have to have to qualify as a helper in the Communications and Signals Department? A. In my opinion, he should have an electrical knowledge, mechanical  
133 ability, and the readiness and the ability to learn.

Q. Now, what about the signal man? A. Well, the signal man is normally promoted from your lower classes after a training period.

There's one other qualification that anyone needs to learn with the Railroad and that's train operations, particularly in the Signals Department.

Q. Now, with the seven additional employees, you would be fully able to comply with the collective bargaining agreements in the light of your present operation? A. If they are qualified employees, qualified in or able to maintain our equipment.

Q. For the moment, putting aside any technical definition in the collective bargaining agreement of journeymen, how long does it take to train a man to perform the technological duties of a helper, assuming that he has the background of electrical knowledge, mechanical ability and the ability to learn? A. In accordance with the agreement, it takes four years.

Q. Yes, sir. Putting the agreements aside now? A. That would depend upon the ability of the man, for one thing, and what his past experience was.



134 Q. Have there been any new employees hired in your department since you came? A. New employees? Yes, sir.

Now, what do you mean by "new employees"?

Q. Employees who were— A. That have never worked for the Railroad previously?

Q. Well, yes. A. Yes, sir, there have been.

Q. And have you been able to train them to perform adequately the duties in your department? A. We are in the process of training them. I wouldn't say they were fully qualified as of this date.

Q. Are they getting on-the-job training? A. Well, that's practically the only training we can give them is on-the-job with the actual work that has to be performed.

Mr. Shapiro: I think that's all I have, Your Honor.

#### Further Cross Examination

By Mr. Milledge:

Q. When was the last time, Mr. Webb, you added a man to your department? A. I believe it was in the Spring. I couldn't say what date exactly.

135 Q. Spring of this year? A. Spring of this year.

Q. And you say you need seven more men to operate under the contract? A. Yes, sir.

Q. But you have been operating since the spring with, what is it, eleven scope employees? A. Eleven scope employees.

Q. And you haven't added anybody since then? A. No, sir.

Q. And I take it you've got more work than your men can handle? A. Let's say there's some work that they can't handle because they're not qualified.

Q. Are you getting the work done or aren't you? A. We're getting the work done, partially with supervisory personnel.

Q. When you say "supervisory personnel", are you talking about these four supervisors? A. Yes, sir.

Q. You're not talking about supervisors from some other department, are you? A. No, sir, no other department.

Q. Are you letting your eleven men work in other  
136 departments? A. I can't say that I am.

Q. And you haven't had any men from other departments come to assist your eleven, have you? A. Not specifically.

Q. So you don't have any problem in your department about crossing craft lines at the moment? A. I haven't.

Q. What you say is, then, that you would like for the moment to be able to continue to use—are you a supervisor? I mean, are you one of the four? A. No, sir.

Q. All right. But you say for the moment you would like to be able to use those four supervisors to do actually work in addition to just supervise? A. That's correct, in order to assist with these men's training.

Q. And is the recruitment on the FEC of new employees, is that a centralized recruitment? A. I wouldn't say essentially that it was.

Q. I mean, do you—you told us that there were three or four; is this correct, when you came to work in September of '63, there were three or four scope people? A. Yes, sir.

137 Q. All right. So you have added seven or so, seven or eight, since then? A. Yes, sir, I may be—

Q. Since September? A. I may be wrong one or two but close enough.

Q. All right. Now, did you yourself go out and get these men or did Mr. Wyckoff's office get them? A. I would say I was approached by men wanting employment, and some had been sent me by Mr. Wyckoff's office.

Q. All right. So you did get some of them from centralized personnel recruitment? A. Yes, sir.

Q. Now, have you, since last April, have you had a requisition in to Mr. Wyckoff for seven more men? A. I wouldn't say necessarily seven; I've had a requisition in for men.

Q. Continuously? A. Yes, sir.

Q. And he hasn't supplied you a man since last April?  
A. Let's say he hasn't sent me an applicant that I would accept.

Q. What will you accept? A. A man with the qualifications that I've set forth here previously.

138 Q. Well, I didn't—you tell us again what qualifications, what educational qualifications? A. I would like a man to have a high school education or the equivalent; electrical experience or knowledge; mechanical ability; ability to learn.

Q. So I take it you have turned down—have you turned down applicants since April? A. Yes, sir.

Q. How many have you turned down? A. I would say possibly three.

Q. Were those men sent to you by Mr. Wyckoff? A. Well, I would say two of them were.

Q. So he has only sent you two men since April? A. I would say yes.

Q. And you've turned them both down? A. Yes, sir.

Mr. Milledge: That's all I have, Judge.

The Court: Anything further, Mr. Devaney?

Mr. Devaney: Nothing further, Your Honor.

The Court: Anything further?

139 Mr. Shapiro: No, sir.

The Court: Come away, Mr. Webb.

(Witness excused)

**H. E. Hales,**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please.

A. H. E. Hales.

Q. Are you employed by the Florida East Coast Railway Company? A. I am.

Q. What is your position? A. General Superintendent, Motive Power. I'm also in responsible charge of the Stores Department.

Q. Mr. Hales, I hand you Defendant's Exhibit BB.

Now, I notice in your Department, Mr. Hales—and your department is the Mechanical Department; is it not? A. Mechanical and Stores.

Q. And Stores. Now, in the column here indicating the reduction of requirements, this indicates that in the 140 Mechanical Department that you have present requirements for 82 fewer people than were required before the strike.

Could you tell us some of the reasons for the reduction in present requirements in your department? A. Yes, there are a number of reasons.

Prior to the strike, the Florida East Coast manufactured its own bearings for freight equipment. We have placed all work in the Car Department on a compulsion basis.

Prior to the strike, we performed AER repairs to foreign equipment, primarily equipment of Fruit Growers Express. We have discontinued the performance of work for all outside parties, unless it's essential to our operation.

Q. Now, the manufacture of bearings, that is the 6 that appears in Column No. 4; is that correct? A. That's correct.

Q. So does that also appear in the column headed "Reduction of Requirements"? A. You mean about whether it's in there or not?

Q. Right. A. I presume it is.

Q. Now, when was the manufacture of bearings discontinued, Mr. Hales? A. Shortly before the strike.

Q. Can you tell us very briefly, Mr. Hales, how 141 you arrived at the allocation between the people required in the passenger portion of the operation and

those required in the freight only operation? A. Yes. In many localities, the force assigned to the passenger work was completely separate and independent and it was only necessary to make an analysis of the force reports and payroll reports of the period immediately prior to the strike, those that were not used exclusively to passenger car work could be reasonably allocated thereto on the basis of hours.

Q. Do you go through these records to make this allocation? A. I did.

Q. Now, with the additional positions that were bulletized, Mr. Hales, would you have had sufficient personnel—and you did bulletin 52 jobs; isn't that correct? A. That's correct.

Q. With these 52 jobs, would you have had enough people to have operated in compliance with the agreement? A. No; no, I would have been short. Had they been filled, I would have been short about 17 or 18 jobs. The number of people required in the Mechanical Department fluctuates with the amount of business we are doing, too, so the seasonal requirements would have had to be taken into consideration.

Q. Now, this indicates that you had indicated on this breakdown that an additional 11 positions would have been required if the first bulletin had been filled; is that correct? A. That's correct.

The Court: Would have been required, what?

Mr. Devaney: If the first, if the 52 jobs covered by the first series of bulletins had been filled, 11 more would have been required—

The Court: Oh, I see.

Mr. Devaney: —to permit operations in conformance with the agreement.

By Mr. Devaney:

Q. Now, I note that the footnote indicates, Mr. Hales, that you did in fact bulletin additional jobs; is that correct? A. That's correct.

Q. Now, since November the 2nd, have you bulletined any further jobs than the six indicated in Footnote No. 2? A. Yes.

Q. In other words, you have bulletined six on November 7th through the 17th. What about between the 17th and the present time? Were there any more after that? A. Well, we have filled some jobs that we didn't have to post bulletins for.

Q. How many jobs have you filled, Mr. Hales? A. Other than this, I would say about five.

Q. Now, in response to the bulletins, did you receive any bids from any of the employees who were on strike? A. Would you repeat that?

Q. Did you receive bids from any of the employees who were on strike? A. I received one bid from an employee on strike.

Q. And did this one employee return to work? A. Yes, he did.

Q. Now, did you take any further action in the Mechanical Department to assign senior persons to jobs, even though they had not submitted a bid? A. Yes, we—all qualified trainees were qualified as journeymen on the basis of skill, not on the basis of the four-year rule but on the basis of competence were allowed to bid on these  
144 vacancies and they were awarded such positions if they were competent.

Q. Now, Mr. Hales, when did you join the Florida East Coast? A. March 1st, 1963.

Q. Now, what steps have you taken since March 1st, 1963 to secure new employees? A. Well, when I came to the Florida East Coast, we had about 35 people employed in the Mechanical Department, and of the additional 100 approximately shown there in Column 5, I suppose I've recruited 75 of them.

Q. In what way have you been able to recruit these people? A. Well, I've gone to see personnel people in other industries and plants in Jacksonville and Miami area.

I've gone out on recruiting trips over in Deland. 50% of our employees in the New Smyrna Beach shop live in Deland. They live in Daytona Beach. I have personally devoted a good bit of time to this.

Q. Now, have the employees that you now have, the 136, are all of those people fully qualified, Mr. Hales? A. No, they aren't.

Q. Have you been able to obtain people who were fully qualified? A. Very few. We have obtained some  
145 people, like retired chief petty officers from the Navy who have had engine experience and basic electric experience; that served to reduce their training time and indoctrination into the railway equipment work. The amount of vocational training and experience a man had in similar work has been the determining factor of the length of time that was required to qualify him as a journeyman.

Q. Now, is it still necessary, Mr. Hales, in your department to utilize employees across craft lines? A. Yes, it is.

Q. And what is the reason for this? A. The principal reason for it is because we do not have available the skills we need to perform the work to comply with all the various standards of the Federal laws that govern the condition of motive power and rolling stock, the interchange rules. We just don't have enough skilled people.

Q. Could you give me a specific example or two of what you mean, Mr. Hales, and how people are used in one job and then cross a craft line to do something else? A. Well, yes, I can.

Most sheet metal workers are qualified pipe fitters and, since they are accustomed to doing metal work, they can do  
146 work of the boiler maker craft or the blacksmith craft. That's an example.

An automotive mechanic, as one who has a high degree of skill, usually has some basic electrical knowledge. He's accustomed to replacing brushes in generators and motors and things of this nature. In a short period of



time, he's competent to do similar work on traction motors and generators.

There are numerous examples. Those are only two.

Q. Now, are you still having to do this in order to perform the work in your department? A. Yes, I am.

Q. Are you presently utilizing the exempt and non-exempt supervisors in your department to perform what would otherwise be scope work? A. Only to the extent that it's necessary to operate. Where we do have people in a group that are qualified to do it, that is, work, they do this work under the direction of the exempt supervisor or either the non-exempt supervisor. There are some jobs that both groups work in the craft on. They are primarily jobs that require a very high degree of skill and sometimes even special and unusual qualifications.

Q. Well, why do you not use the people who are  
147 employed as scope people to do the work, rather than the supervisors? A. They don't have the skill to do it. It's a matter of available skill.

Q. Now, what effect would it have on the operation of your department, Mr. Hales, if you could not continue to use the supervisors to perform this scope work and to use the scope employees to cross the craft lines in the manner that you have explained? A. Well, we would have a very rapid and general deterioration of the condition of the equipment and we would fail to meet the requirements of the various Federal statutes that govern the condition of equipment.

Q. Would this have any impact on the operation of the Florida East Coast? A. Yes, it would. In time, we would have to shut down.

Q. Have your efforts to recruit diminished at any time, Mr. Hales? A. No, they haven't.

Q. Is your program of trying to secure employees continuing to the present time? A. Yes, it is continuing.

148 Mr. Devaney: No further questions, Your Honor.

## Cross Examination

By Mr. Shapiro:

Q. How many supervisors are there in your department, sir? A. You mean general foremen as well as foremen?

Q. How do you define supervisors in your department?

A. Well, we have the total of 23 exempt and non-exempt supervisors.

Q. What is the difference between an exempt and non-exempt supervisor? A. An exempt supervisor is a general foreman.

A non-exempt supervisor is a scope foreman.

Q. How many general foremen do you have? A. I'd be glad to count them up. Let's see, we have two in the Locomotive Department at Bowden—about 14.

Q. About 14? A. About 14.

Q. You have 14 general foremen and 23 scope foremen? A. No.

Q. I'm sorry. A. That figure I gave you was total.

149 Q. Total? A. Yes.

Q. 14 general foreman. And how many scope foremen then? A. The difference.

Q. The difference.

The Court: It would be 9?

The Witness: Just about.

The Court: 9.

The Witness: I can count them up.

The Court: Well—

The Witness: And name them, if you would like.

By Mr. Shapiro:

Q. How many scope employees have been in your department, or how many scope employees were in your department at the beginning of the year, say, 12 months ago? Do you recall? A. I can tell you, if you will permit me to look it up.

150 I have a count on January 18, 1964, along with a summary, which I can take out the exempt personnel and give you an approximate figure.

Q. Would you do that, please? A. I have a summary here as of September 30th, '63, about 109.

Q. 109? A. Yes.

Q. Now, you have increased your scope personnel by about 24 employees since September 30, 1963? A. Even more.

Q. Even more. Has there been any reduction at any time since you have come to the Carrier in the size? A. No. There has been an increase. In fact, we actually are employing more than is shown on this report right now. It has been an increase of about five people over this 136.

Q. So it is now actually at— A. About 141.

Q. —141. Where do your people come from when you recruit them? A. Various places. We have some that are former metal workers; some that are former automotive and diesel mechanics; some that have worked in  
151 machine shops elsewhere; some that were former shipyard workers here in Jacksonville, welders and most any of the metal crafts.

Q. What qualifications do you require before you accept a man in your department? I'm speaking of technological, technical qualifications. A. Well, my requirements have been so vast. If an employee could make and meet our basic fundamental requirements and was willing to locate where I had the work available, I have been able to work out something for most of the applicants if they had some form of prior experience.

Q. So your chief, your requirement was prior experience; is that it? In one of the crafts and classes, or one of the lines of work that your department includes? A. In placing a man in an apprentice classification, certainly importance was given to his ability to learn, whether he had any training in technical schools or welding schools or heavy equipment schools, the length of his experience in

allied work, such as automotive work or engine work or electrical contracting, things of this nature.

Q. How did you determine his experience? I'm sorry. How did you determine his qualifications? A. Well, in many cases, we hired a man at the lowest apprentice rating and, within a probationary period, left it entirely up to the supervisor who was assigned the responsibility for training the man to determine his level, and within  
152 that 45-day period he was reclassified on the basis of his skill and experience to his proper level in the training program.

Q. How did you select him for a probationary period?  
A. How did I select him?

Q. Yes. A. This is when we were working under the "Conditions of Employment".

Q. And how did you select the men at that time? What procedures did you use? A. Oh, I used personal interview. We actually gave him certain tests in welding and general mechanical experience, all kind of vocational testing.

Q. And any educational requirements? A. Yes, but we didn't always—that wasn't the criteria, whether a man worked or not. We were seeking primarily skilled people, trades, metal trades, electrical trades, journeymen workers.

Q. Any physical requirements? A. Well, I don't determine the physical standards. The Chief Surgeon does that. I've had many qualified applicants on the basis of skill that did not meet our physical standards.

153 Q. Were they physical standards in effect prior to the strike? A. I don't know. I was not here prior to the strike.

Q. When did you make a determination that you would not require the hundred—I'm sorry, the 82 positions that are listed in Column 7 on Exhibit BB, which I think is before you; is it not? A. When did I make a determination of that?

Q. Yes; you will note— A. The strike itself made a determination of that. This was automatic. This is a consequence.

Q. So that the reduction in—your testimony is that the reduction of requirements for the basic operation of the Carrier, as listed in Column 7 of the exhibit which is before you, is not a result of changes in operating methods but simply a response to the strike? A. Not entirely. Some of these 82 is because operating conditions have changed; but quite a few has been the consequence of the strike. For instance, we were doing a lot of work for outside parties that we didn't actually have to do. In the Car Department alone, I estimate there was some, oh, 52, 53 people engaged in repairs to foreign equipment that we did not have to perform.

154 Q. Now, If you were required to operate without the 52 employees that are listed in Column 6 of Exhibit BB, which is before you, what effect would that have on your operation? A. Well, it would, in a short time, either we would have to curtail some of the operation or it would be impossible to operate.

Q. Now, if you did curtail, would you still be able to continue to operate? A. Certainly we could operate a portion of the service.

Q. What portion? A. 70%

Q. Beg pardon? A. 70%.

Q. 70%? A. That's my estimate.

Q. How do you reach that figure, sir? A. 25 years of experience in this field.

Q. And this is just your feel for the area as a professional? A. Beg pardon?

Q. This is the way, you have a feel for the area; is that what you are basing it on? A. No. I've made  
155 an appraisal of what every man in this department does and what is required to be done, and made a comparison.

We need about, roughly, a third more people.

Q. Have you had any difficulty obtaining employees? A. Oh, I could fill the shop full of unskilled people but I haven't been able to locate all the skills I need; but each day I improve it some.

Q. And the outlook on the whole is cheery; is that what you are telling us? A. Certainly, as we intensify our efforts to train the trainees that we have and qualify more people, our personnel problem becomes less acute.

Q. How long would it take you to recruit 52 additional people, if you undertook an intensive recruiting program?

A. Seven or eight months.

Q. Seven or eight months? A. Yes.

Q. How long would it take you to get 25? A. Half that time.

Q. 120 days? A. Right.

Q. What are the principal crafts and classes that  
156 are in your department? A. Machinists, electricians, sheet metal workers, car men, boiler makers, all the shop crafts.

Q. Is there any— A. And firemen and oilers.

Q. This is stationary firemen? A. Yes.

Q. Is there any of those which require special railroad experience or knowledge? A. Yes.

Q. Which ones? A. Machinists, electricians, pipefitters—practically all of them.

Q. But you have been able to recruit from industrial sources a satisfactory work force? A. Very satisfactory.

Q. Do you think your work force is superior to what it was before the strike? A. Well, I don't know what it was prior to the strike. I was not here.

Q. Were you then working for a railroad? A. No. I was Equipment Specialist with the Interstate Commerce Commission.

Q. Had you been engaged in railroad supervisory  
157 work? A. I'm a former Chief Mechanical Officer, Central of Georgia Railway Company, and also the New Haven Railroad.

The Court: What was the last one?

The Witness: Central of Georgia and New Haven Railroad.

The Court: New Haven? All right.

Mr. Shapiro: I think that's all I have.

#### Further Cross Examination

By Mr. Milledge:

Q. Mr. Hales, you are also up here to testify about this Stores Department, I take it? A. Yes, sir.

Q. What is that? A. That's just exactly what it says. It's the Stores Department. It handles the storing and dispersal of materials for our usage, and purchasing of materials for our usage.

Q. What scope of personnel, what organization? A. Primarily the clerks.

Q. So these—what do these people do? A. They handle the clerical work in the requisitioning and procurement of materials, dispersal of those materials.

Q. That's in connection with your shops? Is that what it is? A. The shop, the Mechanical Department, is the greatest user of the stores dispersals, yes.

Q. And you've got—so you don't have any personnel problem, I take it, in the Stores Department? A. None at the moment.

Q. So I take it you are not asking His Honor for any special variances pertaining to that department?

In other words, you are operating, you are just using clerks and clerks are doing clerk's work; right? A. That's correct.

Q. And you are not putting anybody from outside in to help them, are you? I mean, are these 19 people getting the job done? A. Yes.

Q. And do they go out on the road or do they go into the shops? A. Well, we have two separate—we have a line of road classification as well as a localized classification,



so we are attempting to keep these two categories separate.

Q. Well, anyway, you show here that you've got 19 and you really only feel that you need 20? A. That's correct.

Q. Isn't that what this shows? A. That's correct.

Q. So essentially, you don't have a personnel problem here? A. That's correct.

Q. All right.

Now, you were about to tell us awhile back the number of men in the shop craft, that is, your Motive Power Department, on January 14, 1964, but I don't believe you ever got to that. A. I have the compilation but it also includes my office staff and all the exempt people.

Q. What it essentially shows is that the number of people in January is essentially the same as you show today; is it not? In other words, it shows essentially 130—135 people back in January, just like it does today? A. January 18th?

Q. Approximately. A. No, there is some difference. I can determine the difference by location.

In the two shops, we have an increase or 8 men at New Smyrna Beach.

160 The Court: I'm not sure just what this answer means.

By Mr. Milledge:

Q. Do you mean that the New Smyrna shop increased eight men from January to November; is that what you mean? A. That's correct. We've had some force turnover. I mean, scarcely a week passes that you don't have some of the older ones dropping out and some new ones coming in, some promotions.

Q. All right. Well, in any event, I gather your figures indicate somewhere around 120 or so in January, 120-130 in January? A. I would have to go through and pull out—

The Court: He says 136 now and 8 less in January.

Mr. Milledge: All right.

The Court: That would be 128; isn't that right?

Mr. Milledge: All right.

By Mr. Milledge:

Q. There is no question, Mr. Hales, that there is great savings in money, an enormous saving to the Railroad, to be able to operate men in more than one craft; is that not true? A. Yes, this is true.

Q. And that's what you have been doing up until the present time; is it not? A. Now, let's don't put words in my mouth.

I don't assign an electrician to do a laborer's work if I have electrician's work for him. And conversely, I don't assign a machinist to do electrical work. I try to utilize the skill of the people that we have to get the work done. We have a static work load that has to be done to comply with Federal law, insofar as locomotives are concerned, and certain things with respect to rolling stock.

Q. Well, do you work them across craft lines or don't you? A. Yes, we do.

Q. All right, that was my question.

Now, how many electricians do you need? A. Oh—

Q. Or how many do you have right now? A. I need 9. I'll take 9 in the morning.

Q. How many do you have right now? A. I can add them up.

Q. You didn't bring those figures? A. Yes, I can figure them up.

162 Q. Let me ask you this, just a general question: Have you got a surplus in one mechanical division? A. I don't know what it is.

The Court: Is the answer no?

The Witness: No.

By Mr. Milledge:

Q. The answer is no?

Now, when was the last time you took one of these recruiting trips? A. About two weeks ago.

Q. Where did you go? A. I went to Deland.

Q. Who did you see? A. The operator of a machine shop.

Q. For whom? A. For himself.

Q. Your own machine shop? A. No.

Q. Who did you go see? A. The man's own machine shop, his machine shop, yes.

Q. What man?

163 Mr. Devaney: Your Honor, I object to this. I don't see that this has any relevance to what we are inquiring into, as to certainly Mr. Hales—what persons Mr. Hales may see, it would seem to me that he has testified that he has made recruiting efforts.

The Court: Objection overruled.

Mr. Milledge: What man?

The Court: He's on cross-examination.

The Witness: I think his name is Adams.

I also called on a—

By Mr. Milledge:

Q. Well, let's hold on: Mr. Adams; and where does he live or where is his place of business? A. In Deland.

Q. What type of business? A. Machine shop.

Q. What type of machine shop? What does he do? A. He operates a machine shop, a general repair machine shop.

Q. All right. And what was the nature of your  
164 conversation with him? A. I told him that I needed some qualified machinists and asked him if he knew of any that I could contact.

Q. And what did he—and did he give you any leads?  
A. Yes.

Q. All right, did you see somebody else? A. Yes.

Q. Who was that? A. A man that operates the Deland Armature Works.

Q. What is his name? A. I'm sorry, I can't call his name.

Q. All right.

Now, as a result of this trip, I think you have already told us you got five new men in this past month, and that is a result of this recruiting? A. No. I don't say that all five men are a result of recruiting.

Q. Where did they come from? A. Some of them were referred to me by the Personnel Department.

Q. How many? A. I would say probably three of them.

Q. How many did you get from your recruiting drive? A. Well, I got two.

Q. All right.

You started, I think you have told us you started, back on March 1, 1963, with 35 people? A. That's about right.

Q. And on September 30th, you had 109? A. That's about right.

Q. So that's 75 more people. And then you figured out what it was about January 18, I believe you gave us the date; and you are presently lacking about 45 men, you say, of being able to comply with the contract? A. No. We bulletined 52 vacancies.

Q. Yes. A. We needed all 52 people. They had the skills that we need.

In addition to that, we have bulletined 6 additional jobs.

In the meanwhile, we have promoted some trainees from apprentice to journeymen. So I wouldn't say—

Q. These figures don't include apprentices? A. Yes, they include trainees, apprentices.

Q. Well, when you promote somebody, does that change these figures? A. No, but if we promoted a man from an apprentice classification, there's no requirement on us to bulletin a job for an apprentice, but once he becomes qualified for a journeyman's job and we

expect to use him as a journeyman, we have to bulletin a vacancy.

Q. What does that have—what does that mean about your total man-power requirements? It reduces your total man-power requirements; is that it? A. No, we haven't actually reduced the man power. We have actually increased it from the number we have shown here.

Q. So that your requirements are less than they show on here; is that it? A. In other words, if we promoted an apprentice to a journeyman, we would probably bring in another trainee to fill his vacancy.

Q. Well, have you got plenty of people eligible to be trainees? A. We have quite a few apprentices.

Q. Have you got enough to fill the 52 vacancies? A. Just by coincidence, we have 52 apprentices.

Q. Just by coincidence.

Mr. Milledge: That's all I have.

#### 167 Redirect Examination

By Mr. Devaney:

Q. Mr. Hales, did I understand you to say that in January of 1964 you had eight less people over-all than you have at the present time, or did— A. That's about right, in two shops.

Q. Only in two shops? A. Those are the only two shops. The total figure in the other shops is comparable, but they were different people.

Q. And because the other people that you had to bring in represented the turn-over in your department in the other shops; is that correct? A. Yes, we've had a good bit of turn-over.

Q. Now, when you testified you had obtained satisfactory employees from another industry, Mr. Hales, are these people fully qualified journeymen? A. No, they aren't; but where a man has worked in a similar journeyman's classification and is trainable, he can become a very

satisfactory employee. The amount of his experience and training prior to employment usually determines the length of time it takes to qualify him in the railroad field.

Q. Have these people still had to undergo considerable training before they would reach the journeyman classification? A. Yes.

Q. Could you tell us, Mr. Hales, what sort of jobs were involved in the 52 that you bulletined? A. If you will bear with me until I can find it.

Well, there were, from memory, there were 13 machinists; 9 electricians; 4 engine house foremen; a car foreman, or 2 car foremen. I have it in detail, if I can find it. Here it is:

4 engine house foremen; 1 wheel shop foreman; 3 car foremen; 13 machinists; a boiler maker; 9 electricians; 2 sheet metal workers; 2 carmen air brake repairers; 2 carmen engine carpenters; 14 freight car repairers and car inspectors.

Q. Just out of curiosity, what kind of carpenter was that? A. Engine carpenter.

Q. Just out of curiosity for me, what does an engine carpenter do? A. An engine carpenter is a carman who does work with his qualification on locomotives, such as replacing glass in the cab or certain work that, due to past practice, was transferred from the old wooden cab on a steam locomotive into the modern cab or steel cab of a diesel.

Q. Now, in the main, Mr.— A. Painting is carmen's work, too, on locomotives.

Q. In the main, Mr. Hales, who is now performing the work of the 52 additional jobs that you bulletined? A. Well, some of it is being performed by exempt and non-exempt supervisory people, general foremen. Some of it is being performed by trainees, and some of it just isn't being performed.

Q. Now, what sort of work would fall in the last category or just not being performed? A. Anything that

could be deferred without detriment, immediate detriment to our ability to stabilize our operation, like painting of our passenger units that are sitting out in the yards. They are deteriorating but we are not using them. That's a good example.

Q. Now, what sort of skills, Mr. Hales, of an essential nature are now being performed by your exempt and non-exempt supervisory employees? A. Well, it's primarily work that we don't have anybody else qualified to assign to. It's almost limited to that requiring a particular type of skill or vocational training.

Q. Could you give us some examples, specifically, 170 of what you are referring to? A. Yes. Car inspection in our train yards here in Jacksonville is a good example, where we don't have enough qualified car inspectors to make interchange inspection. This inspection is made under close scrutiny of our general foremen.

Another example is in the maintenance of our radio equipment on locomotives; a prerequisite requirement for adjusting the transmitter is to have a license granted by the Federal Communications Commission and we need three radio electricians. We only have two employed so, when it's necessary to do certain transmitter work, we have to use our supervisory people to do this, depending on the volume of the work that is necessary at the time.

Q. What sort of work does a car man do, Mr. Hales? A. A car man?

Q. Yes, sir. A. He inspects and repairs freight cars and brake equipment on freight cars, all associated work of this nature.

Q. Now, are some of your people in the car shop doing this kind of scope work? A. No, it's not just—it's something that requires an unusual skill or experience, 171 where they are actually working in the craft.

Mr. Devaney: No further questions.

The Court: You may come down, Mr. Hales.

(Witness excused)



The Court: I'm just wondering. I told you that I would hear some additional matter in the Engineers' case during the day. I just wonder if we hadn't better break off and go into it.

Mr. Devaney: Well, that is agreeable with us, Your Honor.

The Court: Sir?

Mr. Milledge: That would be entirely—

The Court: I don't know how long it will take. I don't know what you have in mind. But the Stay I entered was set to be to and including November 30, I think is what I said. And Judge Tuttle's Order was specific that it ended at, I thought it was 12:01 in the morning but it's 00:01 in the morning but I think that means a minute after 172 midnight anyhow.

Mr. Milledge: That's right.

The Court: And if you have something you want to take up about it, maybe we ought to go into it at an early enough hour to do some good.

Suppose we break off for about five minutes and then drop this and go into that case.

(The Court thereupon heard another matter unrelated to the subject proceeding, after which the following further proceedings were had:)

The Court: It's apparent we cannot finish the Government's case, the non-ops' case, this afternoon; that we are going to have to go over and take some more testimony in the morning on it. And if you want to stop now, it's 5:00 o'clock now. We can stop or we can go on for a few more minutes. I don't think we can finish it in either event.

Mr. Devaney: Either procedure is entirely agreeable with me, Your Honor. I'm willing to continue or willing to adjourn, whichever is the pleasure of the Court.

173 The Court: Well, I would just as soon go on and

get another start at 9:30 in the morning, if it is agreeable with you, Gentlemen.

Mr. Milledge: All right, sir.

The Court: Take an adjournment until 9:30.

(And thereupon, at 5:00 o'clock p.m., on Monday, November 30, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m., on Tuesday, December 1, 1964.)

174 (At 9:45 o'clock a.m., on Tuesday, December 1, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had:)

The Court: Good morning, Gentlemen.

Counsel: Good morning, Judge.

The Court: All right. You may proceed, Mr. Devaney.

Mr. Devaney: Mr. Davidson.

**A. A. Davidson, Jr.,**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. Would you state your name for the record, please.

A. A. A. Davidson, Jr.

Q. And are you employed by the Florida East Coast?

A. Yes, sir.

Q. What is your position? A. Assistant Chief Engineer.

Q. Now, as Assistant Chief Engineer, does the

175 Maintenance of Way work fall under your jurisdiction? A. Yes, sir, it does.

Q. Mr. Davidson, I hand you—

Mr. Milledge: Excuse me, I can't quite hear. You'll have to speak louder.

The Court: I would like the counsel and the witness to both speak louder, if you don't mind.

By Mr. Devaney:

Q. I hand you Defendant's Exhibit BB.

Now, in the Maintenance of Way Department, Mr. Davidson, I notice that you have shown a reduction of requirements of 112 people. Could you tell me the reasons for this reduction in requirements? A. Yes, sir, a combination of factors:

One, a change in our operations, that is, terminals that are not being maintained as terminals that were formerly maintained as terminals;

Better and improved work methods;

Addition of additional equipment that performs work cheaper and with fewer people.

Q. Could you give us some specific examples, Mr. Davidson, of new equipment that you refer to? A. Yes,  
176 sir. Our maintenance is based primarily on a timbering and surfacing gang, now and before the strike. We've acquired new tamping machines that have a considerably increased capacity. These machines automatically or electronically raise the track to surface and tamp the track. Recently we have surfaced, with only two operators and no additional help, a mile and a half or mile and three-quarters of track in a day. This formerly required 18 to 20 men to perform this work. This new gang has a capacity of over 200 miles of track per year, which places our track on a good maintenance cycle.

We've acquired additional cars for handling ties.

The Court: Wait a minute, Mr. Davidson.

(Brief pause while sirenes passed)

The Court: Go back just a little bit.

The Witness: We have acquired six additional tie unloading cars. This work was performed—tie unloading in front of the T&S gang was performed by 8 or 10 men throwing the ties out of the car, and we now unload the ties with one operator.

And we have acquired a front end loader with a  
177 winch. We are able to relocate turnouts as units,  
that is, without disassembling the pieces, and this  
can be done in three or four hours with a small, 4 or 6, man  
work force. It formerly required 8 to 12 men three days  
to relocate a turnout.

We've acquired or we have modified our tamping machines. They formerly did a very inadequate job of smoothing. We have added additional units to those machines and now get better work which lasts longer and requires less frequent smoothing.

We've acquired a new ballast regulator which does our dressing and reduces the number of laborers formerly required to do the dressing.

One of our new tampers now will surface a turnout. This has always required 12 men four or five hours to surface a turnout, and we can now do it with this new tamper with 2 or 3 men.

We have a unit now for aligning turnouts. This formerly required a large force and was a difficult job. We can do this with one operator, one laborer.

These are the things that added to the fewer men required.

By Mr. Devaney:

178 Q. Have you also acquired new inspection equipment? A. Yes, sir. I failed to mention our "hi-rail" equipment, which is probably—our basic inspection and repair system was formerly by motor cars, and now this work is performed by "hi-rail" trucks that can easily get on and off of the rail and are highly mobile. They are equipped with a lot of power tools that formerly required a number of men to handle, and these are stationary on the truck and can go by rail to a site and do the necessary smoothing or repairs with small forces; and because their mobility can be used over a much wider area than the motor car. They are equipped with radios, which

gives much more track time than we formerly had by constant contact with the dispatcher.

This has added to our—

Q. Has the installation of CTC had any effect on the number of people in your department, Mr. Davidson? A. Yes, sir, approximately one-fifth of the Railroad, the main line, has been CTC'd and this effectively reduces the number of miles that need to be maintained. It allows us to remove the number of crossovers which are always expensive to maintain and require a lot of maintenance. We have less track to maintain and, of course, this program, as it continues, will probably further reduce the number of people required to maintain the Railroad.

Q. Now, I notice that in your department a total of only 6 jobs were bulletined on November 2nd and 3rd.

What types of jobs were involved in those six which were bulletined, Mr. Davidson? A. We were seeking a bridge gang in these bulletined jobs. This is the area that we need people in the most. And one of the jobs is a section foreman job.

Q. Is the bridge work being performed by your own employees at the present time? A. Our bridge maintenance is being performed by our own employees and some construction. We do have a bridge contract force who are doing some rebuilding. If we were able to fill these bulletined jobs, we would be able to do this with our own forces.

Q. Now, except for this work which is contracted out, Mr. Davidson, are you able, with the number of people you now have, to comply fully with the agreement covering the employees in your department? A. Yes, sir.

Mr. Devaney: No further questions, Your Honor.

#### Cross Examination

By Mr. Shapiro:

180 Q. Mr. Davidson, when did you join the Florida East Coast Railway Company? A. April, 1964.

Q. And where did you come from, sir? A. Southern Railway System.

Q. You were Assistant Engineer on the Southern Railway? A. Assistant Division Engineer.

Q. Division Engineer? A. Yes, sir.

Q. Are you a railway engineer by training? A. Yes, sir. I'm a civil engineer by college training and railroad engineer by twelve years of experience.

Q. How did you familiarize yourself with your new job when you came to the Florida East Coast Railway Company? A. By covering the track, to begin with. The quickest way was by train and, the second day I was employed, I covered all the main line by riding an engine; and since that time have travelled extensively by train and "hi-rail" car. A big majority of my time is on the track by on-the-spot inspection.

Q. Have you examined the records of your department to get a picture of how the Railroad operated prior  
181 to the time you came? A. Yes, sir.

Q. And you are familiar with the Railroad's requirements and operations prior to the time you came? A. Reasonably so, yes, sir.

Q. Do you know the size of the work force in the Maintenance of Way Department twelve months ago? A. Yes, sir. In October, 1963, we had 71 employees.

Q. So that you have increased your work force in the last year by what number? A. Well, the total today is 115, so we have increased it by 44.

Q. Have you had any difficulty in recruiting people? A. Yes, sir, we have had considerable difficulty.

Q. But you have been able to acquire 44 employees in the last year? A. Yes, sir.

Q. When did you determine that your requirements had been reduced to a point where you could eliminate 112 positions from the number of positions which had existed prior to the strike? A. I wasn't faced with eliminating anyone, so we tried to bring the state of maintenance up

to an acceptable one by adding forces as they were required and as we could acquire new men. And we have, we  
182 think, reached that point now.

Q. The question was: When did you reach— A. Very recently; I don't think there is any specific time. We have up until, and still are, creating new gangs and we are doing this by surplus on larger gangs being eliminated by additions of mechanized modern equipment. And we think, in fact I think that probably in the last few months I have begun to see exactly what I thought was needed to maintain the Railroad.

Q. When did you begin to use "hi-rail" trucks? A. In December; I was not here but the records reflect that in December, 1963, the first "hi-rail" trucks were received.

Q. In December of 1963? A. Yes.

Q. And how many "hi-rail" trucks were there by the time you came? A. Twelve, sir.

Q. How many do you have now? A. Twelve, sir.

Q. You say these "hi-rail" trucks have contributed substantially to the effectiveness of the operation of your

Maintenance of Way Department? A. Very much.  
183

Q. If you didn't have them, how many employees would you require over what you presently require?

Mr. Devaney: Your Honor, I object. I don't see why the question is relevant. If he didn't have them, it's contrary to the fact that we do have them.

The Court: Well, he testified that the addition of "hi-rail" trucks with stationary power tools located on them permitted a reduction of force. I think certainly it may be inquired into.

Mr. Devaney: I don't object to that, Your Honor, but I object to the form of the question which is put in the terms of how many—

The Court: How many would you otherwise need?

Mr. Devaney: Right.

The Court: It's intelligible to me.

You may proceed.



By Mr. Shapiro:

Q. Did you understand the question? A. Yes,  
184 sir, I understood the question.

It would be difficult for me to say. My experience with motor cars, I know that you are limited to the territory you can cover. They are expensive to maintain. They are difficult to get over the railroad, because no contact with the dispatcher. They are dangerous. You are quite limited in the tools you can carry on a motor car. They are small and you are limited to the small hand tools and the number of men you can carry is quite limited. I think it would be very difficult for me to say just how many, but I think it would be many.

Q. A substantial number? A. A substantial number, yes, sir.

Q. So that, at least by April of 1964 when you came, the presence of the "hi-rail" cars made it clear that the Railroad could effect a substantial reduction of requirements from pre-strike requirements? A. Yes, sir.

Q. Do you have Exhibit BB before you, sir, the chart? A. Yes, sir.

Q. Now, you have testified that if the six additional positions listed for the Maintenance of Way Department in Column 6 were filled, you would be fully able to comply with the collective bargaining agreement; is that  
185 right? A. Yes, sir.

Q. So that if there is any necessity for departing from the agreement, it's in connection only with those six positions; is that right? A. At this time, yes, sir.

Q. What are the six positions? A. They involve one foreman and the remaining, for the bridge gang, a bridge foreman, one track foreman, one bridge foreman and four bridge men.

Q. What are the requirements for a bridge man? A. I'm not sure of the apprentice program that we had on this Railroad but it requires several years experience and he

has to be familiar with heavy timbers and in their framing, and he has to be familiar with pile driving generally. He has to be familiar with repairs to concrete, handling of pipe, repairs to steel bridges, that is, bolting, riveting, painting and general maintenance of bridges and also of buildings.

Q. And bridge men are specialized construction workers; is that really what they are? A. Yes, sir.

Q. And the other positions that you had listed, as a Foreman and Assistant Foreman; is that it? A. No, sir.

One was a track foreman—this was not related to  
186 the bridge gang.

Q. I see.

The Court: A bridge foreman and a track foreman and four bridge men?

The Witness: Four, that's right, sir.

By Mr. Shapiro:

Q. The bridge foreman was a more expert construction worker? A. Yes, sir. He is just a good bridge man, workman, and has the ability to supervise.

Q. Now, are you carrying on any contracting out program in the Maintenance of Way Department? A. Yes, sir. We are contracting this bridge work that we mentioned, and then we are doing some contract track work where we have a big job such as an industrial park development that has a lot of drainage and grading and paving and track work; also for piggyback facilities that has a lot of fencing, acres of draining—I mean, acres of paving and a lot of grading; that type of equipment that we do not own and track work which is incidental to this other work. We have contracted and are contracting that type of work, yes, sir.

187 Q. Now, in your experience on the Southern, can you tell us whether the type construction you have just described to us would be contracted out in the normal course of the Railroad's business? A. Yes, sir.

Q. So that we're not concerned with any contracting out work that deals with the normal operation of the Railroad, but rather with a special construction program when you refer to contracting out? A. Yes, sir.

Q. And if you had the six additional men that are listed on Exhibit BB, the little bridge work that you are now contracting out would be also done by the regular staff; is that right? A. Yes, sir.

Q. Now, has the Railroad acquired substantial quantities of new equipment since you came to it in April? A. Yes, sir.

Q. So that some of the reduction in force requirements have occurred since you came to the Railroad? A. Yes, sir, a considerable amount, other than the "hi-rail" cars, have been acquired in the last five or six months.

Q. Could you—are you sufficiently expert to make 188 an estimate of the number of employees who are no longer required, as compared with pre-strike operations, as a result of the equipment acquired since April of 1964? A. I think it would require taking each unit and making an estimate of what the unit does. I think I can do that, yes, sir.

Q. You have before you some notes, do you not? A. Yes, sir.

Q. What are they? A. I had some notes referring to the number of foremen I had and number of employees at various dates, and supervisory people.

Q. Do you have anything in your notes concerning the pre-strike requirements? A. Only the total number of employees, and as broken down by gangs, number of men per gang and the locations; yes, sir, I do have that.

Q. Would it be possible for you to give us from your notes within a brief period a more precise statement of the number of employees who would no longer be required as a result of the equipment acquired since April of 1964? A. As an example, extra gang No. 4, which is a timbering and surfacing gang, in January, 1963, this gang had a

total of 30 laborers and 10 machine operators and  
 189 various others, making a total of 48 men. And the  
 gang that replaces that gang with the new tampers  
 has approximately 12 laborers and 8 machine operators  
 and has about four times the capacity to do work that this  
 former gang had. So I don't know how we would say.  
 Certainly we have eliminated 28 men but they are doing  
 four times the work, so this work won't have to be re-  
 peated; so actually, it's more men than that eliminated.

These new tampers have an electronic beam to pull the  
 track to surface and cross level and tamp electronically,  
 and the operator only has the function of stopping the  
 machine and does this in about five seconds per tie, where  
 the former machines required 22 to 23 seconds per tie.  
 It does a better job; it has a better tamping principle. It  
 requires us to raise the track a lot less and we don't have  
 to make as high a raise as we formerly made. This re-  
 quires much less ballast and requires, of course, fewer  
 people unloading the less ballast. We don't have to have  
 these people that did unload the stone in front of this  
 gang.

The Court: I'm not sure I understand why it requires  
 less ballast.

190 The Witness: The former machine did not have the  
 capacity to put the ballast under the ties unless a  
 high raise was made, that is, three inches or something  
 like that. And the new machine will raise the track one  
 inch and you get just as good a surface, in fact better, and  
 you don't require that two inches of additional ballast,  
 which amounted to 350 tons per mile or so, and this re-  
 quired a lot of people to unload the ballast. And we don't  
 have any good ballast cars. We use hopper cars to unload  
 ballast, which is not specialized cars.

By Mr. Shapiro:

Q. Now, when did you acquire this special equipment?

A. This has been most recent, in the last of October.

The Court: What is this ballast, Ojus rock?

The Witness: Yes, sir, Ojus stone.

On the same gang, we have a new regulator that will almost completely dress a switch. This is an operation that was formerly done by hand. It would take six men three or four hours to properly dress a switch and this machine does about 75 or 80% of that work. And they  
191 formerly had the same machine but—had a machine but it did not do this function. So we have the same operator we formerly had but are able to eliminate some people in this respect.

We have an attachment to a liner that will line switches. This formerly required six or eight men with jacks and was a very difficult and time-consuming job. And now we can do this operation with the one liner operator, who was formerly assigned, plus one man.

We have a machine that doesn't have an operator on it. It runs completely automatically and sweeps the ballast off the tie plates and, as ties fall down, this formerly required quite a few people to get them up because the ballast would get between the rock—between the rail and the tie plates. This machine, as I say, is completely automatic and doesn't have an operator and it eliminates this need for a lot of people to get up the so-called downed ties and get the rock out from under it, between the rail and the plate. This is a real problem with us.

By Mr. Shapiro:

Q. When did you acquire these machines that you have discussed? A. The ballast regulator—

192 Mr. Milledge: Excuse me, Your Honor.

It seems to me that all of this is irrelevant to what is presently before the Court. The request is for some deviations from the contract and I don't—it doesn't seem to me that what we ought to be litigating here is why more or less men are needed. They are asking for certain deviations.

I mean, I don't think we are here today to litigate how many men different machines, how many jobs are ultimately in the long run going to be lost or not. Certainly I'm not prepared to litigate that part but only as to what may or may not be a reasonable request as a temporary deviation from these contracts. And I think a small degree of explanation of why they are not making other requests at the time is of interest, but this unlimited discussion, it seems to me, puts a different character on the whole litigation.

The Court: Well, this may be substantially correct but it was approached in this manner on direct and I think the Government counsel has a right to cross-examine along this same line.

193 Mr. Milledge: All right, just as long as our position is—

The Court: I think he is somewhere near through with the subject.

Mr. Milledge: Just as long as it's understood that the organizations' position is preserved. We are just here to defend against some temporary changes, not some—what the long-range future impact of change of machinery, and so forth. I think that the context of what's before the Court makes that clear, does it not?

The Court: Yes, sir.

By Mr. Shapiro:

Q. Just one final question:

When did you acquire these machines you have been discussing? A. We designed and built the sweeper back in July. And the ballast regulator was acquired in July. And some of the other machines that we have described earlier were acquired in May and June of this past year, of this year.

Q. Have there been any significant acquisitions of  
194 labor-saving machines that the Railroad formerly did not have, in addition to the "hi-rail" cars, in

December, 1963, which were acquired before May of 1964? A. Yes, sir. They modified their smoothing machines which were able to do a much better job and, of course, required less smoothing.

Q. So that significant numbers of machines were acquired prior to May of 1964? A. Some, yes, sir.

Mr. Shapiro: I have no further questions.

### Further Cross Examination

By Mr. Milledge:

Q. Mr. Davidson, do you have a bridge gang now? A. Yes, sir.

Q. How many bridge gangs do you have? A. We have one bridge gang.

Q. One bridge gang? A. Other than the contract bridge gang described earlier.

Q. And the contract bridge gang is working on what project at the moment? A. A bridge at the twelve mile post. They are redriving the—

195 The Court: At bridge, what?

The Witness: A trestle at the twelve mile post. This is just twelve miles out of Jacksonville. They are redriving the timber trestle south of Bowden.

By Mr. Milledge:

Q. How much longer would it take to complete that job? A. Approximately a month.

Q. Now, other than that job, you are able to operate under the contract? A. No, sir. We have several rebuilding jobs that we had planned to use this gang for, until we could acquire a gang to replace them.

Q. Well, how long have you had your present bridge gang? A. Which? The maintenance gang is our—

Q. You have one bridge gang? A. Yes, sir, we've had for some months, probably October or November of 1963.

Q. And in the meantime, you have increased, let's see:



In October of 1963, you had, I think you have told us,  
196 71 people; right? A. Yes, sir.

Q. So you had quite a few track maintenance gangs? A. Yes, sir.

Q. And you had one bridge gang? A. Yes, sir.

Q. And you increased your track maintenance gangs quite substantially since then? A. Yes, sir.

Q. But you—now, how long have you been using this contract gang? A. Approximately four months.

Q. And before that, you did all the bridge maintenance with just your own one gang; is that right? A. All that was being done, yes, sir.

Q. How did you acquire the bridge gang personnel that you do presently have? Not the contract but your scope?

A. Well, we've had a returnee and the others were recruited as bridge men.

Q. When was it that you joined the Florida East Coast?  
A. In April, 1964.

Q. Can you convert some of your personnel that are in your road maintenance, that is, your right-of-way  
197 maintenance, into bridge gang people? A. We are looking into this and, as yet, we haven't been successful to find the people with the proper experience.

Q. You have, what is it, 115? A. Yes, sir.

Q. But you don't have any of those who are competent to handle a bridge gang? A. They are needed in the jobs they are in also.

Q. What it amounts to—how many gangs do you have altogether? A. We have eight gangs.

The Court: One of which is the scope bridge gang; right?

The Witness: Excuse me, sir. We have nine bridge—I mean, nine gangs, one of which is the scope bridge gang, yes, sir.

By Mr. Milledge:

Q. And what you need to do is to get up enough men to add another gang? A. Yes, sir.

Q. All right. And now for how long have you been at this 115 man level, or essentially that? A. For several months; we've made progressively an increase in the number of employees each month.

Q. Do you have a month-by-month tabulation? A. No, sir, I do not.

Q. Well, you have given us October of '63. What's the next tabulation you have after that? A. Let's see. I have May of '63, we had 11 men. And in October—

Q. Excuse me? A. May of '63, we had 11 men, and in—

Q. I don't understand. Oh, May of 1963? A. May of 1963, we had 11.

Q. I was thinking of May of '64. What do you have for '64? A. I don't have May of '64, sir.

Q. Well, for how long—you've been in charge of this situation. For how long have you had substantially the same number of people? A. About two months.

Q. All right. Well, let's go back to May of this year, 1964. How many did you have then? A. I don't have that figure, sir. It was less than this, probably 15 to 20 less.

The Court: This means you have had 115 since about the first of October? Is that it?

The Witness: Yes, sir.

By Mr. Milledge:

Q. And you think you had about a hundred back in May? That's what you would guess? A. Yes, that would be my estimate.

Q. You are adding men, at what? At the rate of two or three a month? Is that the way you are going? A. Yes, sir. Of course, this doesn't represent the total men. We lose some men too, of course. This is the net.

Q. Tell me about that May of '63 again. I did not write that down. A. 11.

Q. By October of '63, you had 71; right? A. Yes, sir.

Q. You don't, you can only estimate for us about May of this year; is that right? A. Yes, sir.

Q. Which you say you had about a hundred then. And you are up now to a hundred—a month ago, you were up to 115? A. Yes, sir.

200 Q. And you need six more people? A. Yes, sir.

Mr. Milledge: That's all I have.

The Court: Anything further?

### Redirect Examination

By Mr. Devaney:

Q. Mr. Davidson, you said the "hi-rail" trucks, the first "hi-rail" truck was received in December of '63. Were all twelve of them received in December of '63? A. I believe, I'm not sure, sir, I think they were finally received in January, the total of twelve. They were in operation in January.

Q. Now, the equipment which these trucks might carry had that all been—had the trucks been fully equipped at the time they were received or did this take additional time? A. This took additional time, sir.

Q. Could you give us any idea when the twelve trucks were fully equipped? A. They were fully equipped before May of '63, so I would guess probably by March that they were fully equipped, sir.

201 Q. Now, you said that the number of people had increased from 11 in May of '63 to 71 in October of '63 to the present 115.

Prior to your having the maintenance gangs, how was this work performed? A. The maintenance was performed by contract gangs.

Q. And as you have acquired the people, you have taken over the performance of the work that had been contracted out? A. Yes, sir, we've eliminated the gangs as quickly as we could.

Q. The only work that is still being contracted out then is this bridge work that you have testified about? A. Yes, sir.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: Nothing further, Your Honor.

The Court: You many come down.

(Witness excused)

Mr. Devaney: Call Mr. Wyckoff, please.

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**Raymond W. Wyckoff**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

**Direct Examination**

By Mr. Devaney:

Q. Will you for the record please, state your name? A. Raymond W. Wyckoff.

Q. Are you employed by the Florida East Coast? A. I am.

Q. What is your position? A. Vice President and Director of Personnel.

Q. Mr. Wyckoff, I hand you Defendant's Exhibit BB.

Now, on this exhibit, Mr. Wyckoff, a total of 114 positions are indicated as having been bulletined; is that correct? A. That's correct, yes, sir.

Q. Now, did you, in your official capacity, receive responses from any of the Labor Organizations concerning the jobs which were bulletined? A. Yes, several of the Labor Organizations, the General Chairmen, wrote me and advised that their members were on legal strike and that they had been instructed not to bid in the jobs.

203 Q. Mr. Wyckoff, I hand you, this is the attachment to the Application for approval of employment practices, and ask you if these documents which were attached to that Application and marked as Carrier's Exhibits 1 through 14 are a portion of the letters you have received from the various organizations? A. Yes, that is correct.

Q. Now, I hand you, Mr. Wyckoff—

Mr. Devaney: Perhaps we ought to have these marked for identification.

The Clerk: FF.

(The referenced material was marked Defendant's Identification Exhibit FF.)

Mr. Devaney: If we may go off the record just a minute: What I wanted to do, Your Honor, was to include those Exhibits 1 through 14 and have them renumbered so they will fit in with the numbering of the exhibits. It's immaterial how we do it, whichever will be the easiest way.

The Court: Where did they get the numbers 1 through 14?

204 Mr. Devaney: They were attached to the Application we filed, Your Honor, and for that purpose were numbered Carrier's Exhibits 1 through 14.

The Court: Are they of similar content?

Mr. Devaney: Yes, they are.

The Court: Mark them all FF, then.

Mr. Devaney: All right.

The Court: Let the record show they are removed from the Application.

Were they attached to Mr. Wyckoff's affidavit or to the Application itself?

Mr. Devaney: No, Your Honor, they were attached to the—the affidavits were actually attached to the Motion, but two documents were filed at the same time; so while they were not physically attached to the—

The Court: They finally became lodged in the Court file here.

205 Mr. Devaney: That's correct.

The Court: And they had numbers 1 through 14 on them.

Mr. Devaney: 1 through 14, that is correct.

The Court: Well, just let them all be under one number, FF, at this hearing. If you want them to have additional numbers, they can be FF-1 through FF-14; is that—

Mr. Devaney: That's very fine.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, in addition to the ones which will be renumbered as FF-1 through 14, are these additional letters which were received from the Unions? A. Yes, they were.

The Court: Received from whom?

Mr. Devaney: From Unions.

The Court: Oh, from Union Chairmen, Local Chairmen; I see.

206 By Mr. Devaney:

Q. Tell us which Unions? A. The first letter is a letter addressed by Mr. C. A. DuPont, who is President and General Chairman of Local 888 of the International Brotherhood of Electrical Workers. That letter is dated November 10, 1964.

The second letter is a letter addressed by Mr. J. E. Dubberly, General Chairman of the Brotherhood of Railroad Signalmen of America. That letter is dated November 9th, 1964.

Mr. Devaney: I request that the Clerk remove the letters and incorporate them and mark them as Defendant's Exhibits FF-1 through 16.

By Mr. Devaney:

Q. Now, Mr. Wyckoff—

Mr. Shapiro: Mr. Devaney.

Mr. Devaney: Yes, sir.

Mr. Shapiro: The letters that you have there were part of your Application?

207 Mr. Devaney: Yes.

The Court: These last two are additional?

Mr. Devaney: Except the last two.

Mr. Shapiro: Except the last two.

The Court: Mark them 1 through 16, part of the same

exhibit; is that all right? That would be as part of the exhibit.

(The referenced instruments were marked Defendant's Exhibits FF-1 through FF-16 for identification.)

By Mr. Devaney:

Q. Now, in addition to letters from the Unions, Mr. Wyckoff, did you receive responses from individuals? A. Yes, we received a number of such responses.

Mr. Devaney: I ask that this be marked for identification as GG.

(The referenced material was marked Defendant's Identification Exhibit GG.)

By Mr. Devaney:

Q. I hand you, Mr. Wyckoff, the document marked for identification as Defendant's Exhibit GG. Is that the  
208 portion of the letter you received in response from individuals? A. Yes, it is basically a form letter used by most of the individuals who wrote.

Mr. Milledge: They are all the same?

Mr. Devaney: They are all signed by and addressed to different people by different individuals. Most of them involve a form, which is a mimeographed form, but there are a few letters, rather than the mimeographed form, which are included. But they are to the same effect as the form letter.

Each states that the organization is on a legal strike and, because of this, they cannot report for work.

For purposes of further identification, Your Honor, this consists of 24 individual refusals by persons to report for work.

I have left to be typed a list of the letters, identifying them by date and name, and will furnish that as soon as it is available.

The Court: All right; various ones of these non-operat-



ing Unions. They are scattered around through the  
209 Unions; they are not arranged with any particular—

Mr. Devaney: No, and I don't even know whether they are all members of this same Union. I believe, this I don't know, they are from different individuals and they are addressed to different officials of the Railroad.

I move that FF and GG both be received in evidence.

Mr. Milledge: No objection.

Mr. Shapiro: No objection.

The Court: Mark both of them in evidence.

(Thereupon, Defendant's Identification Exhibits FF and GG were received and filed in evidence.)

The Court: And I gather that you are going to attach to GG a list of them?

Mr. Devaney: Yes, Your Honor.

The Court: Just a memorandum.

210 Mr. Devaney: Just as a matter of making it easier to see what is involved.

The Court: Yes, sir.

Mr. Devaney: I ask that this be marked for identification as HH.

(The referenced material was marked Defendant's Identification Exhibit HH.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you a document which has been marked for identification as Defendant's Exhibit HH.

Did you receive this in the course of your official duties from one of the other officials of the Railroad? A. Yes, I did.

Mr. Milledge: In case there is any doubt, there's no contention by the organizations. The organizations are on strike. They remain on strike and, by and large, their membership has not returned to work. So I don't think—I think that, early in the opening statements, it was stated that two or three people from the organizations that bid

jobs for one, or something like that; that, to our knowledge,  
is correct and there is no dispute over the fact that  
211 the organizations remain on strike and their membership, by and large, have not returned; if that will help expedite the proceedings.

Mr. Devaney: I offer Defendant's Exhibit HH into evidence.

Mr. Milledge: No objection.

The Court: May I see that one?

(Thereupon, Defendant's Identification Exhibit HH was received and filed in evidence.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you Defendant's Exhibit HH. Would you examine that, Mr. Wyckoff, and tell me whether the person who wrote this letter had submitted a bid for one of the jobs which was bulletined? A. Yes, he was one of the three bidders. He became assigned to a job as a clerk-operator at Hialeah. We contacted him and asked him to take his physical examination. Before he did so, he contacted us, said he had fallen off of a ladder and had injured himself while painting his house. Then, a couple days later, he contacted us and said he was on strike and could not cross the picket line. And then he wrote this letter confirming it.

212 The Court: Well, that letter is confirming what he—well, now, this last, you say he contacted you; did he contact you or someone else?

The Witness: Not me personally, no, sir. He contacted—

The Court: You don't make any point of this as to it being hearsay?

Mr. Milledge: No. I mean, the people haven't returned.

The Court: This letter confirms what somebody told you he told them?

The Witness: That's correct.

The Court: All right.

Mr. Milledge: It's just a detail of a general thing, of which there is no contest at all.

The Court: Well—

213 Mr. Milledge: But—

The Court: It makes a difference to know—do you know whether he is a member of the Clerks' Union or not?

The Witness: He isn't a member of the Clerk's Union. This was the Telegraphers' organization.

The Court: Oh, I'm sorry, I thought it was the Clerks'. Well, do you know whether he's a member of the Signalmen?

The Witness: I don't know whether he's a member or not. I assume he is.

Mr. Shapiro: Your Honor, I wonder whether we could work out some form of a stipulation rather than to go on with this, to the effect that eleven labor organizations, eleven non-operating organizations, are on strike. Their membership, for the most part, is adhering to the strike. They are not crossing the picket lines and they are not responding to the bulletining; rather than go through all this.

214 Mr. Devaney: Well, this was—we had put in what we intended to put in, Your Honor. We felt that the record must show the efforts that we had made to bulletin the positions and the fact that the people did not return to work in response to these bulletins. We have done that and—

The Court: It's in then?

Mr. Devaney: That's correct.

The Court: All right.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, turning again to Defendant's Exhibit BB, are you familiar with the operations and the requirements of the Accounting Department? A. Yes, I am.

Q. Would you tell us, Mr. Wyckoff, what some of the

reasons are for the reduction of requirements in the Accounting Department, which is shown on this exhibit as 10? A. Well, for one thing, a number of reports that were prepared in the past, statistical reports, have been discontinued. They weren't essential reports and we found 215 we could do without them.

For another thing, much of the remaining reports have been transferred to the machine accounting bureau for preparation. They are prepared on the basis of key punch cards that are prepared at the Bowden Yard or the Hialeah Yard. Those key punch cards, when they have served the needs of the Transportation Department, are forwarded to the Accounting Department and the same cards are used for their purposes.

Q. In other words, they don't have to re-type or re-assemble the information? A. That's correct. It is already on the cards.

Q. And it would be collated by machines, by running these through a machine rather than an individual doing it? A. That's correct.

Q. Now, I note that 17 jobs were bulletined in the Accounting Department, Mr. Wyckoff. Did any—were any of these positions filled by people accepting the—or in response to those bulletins? A. No, not from the strikers.

Q. Now, with the the 42 people which they had, was the Accounting Department able to perform the work required without having the employees cross over either craft 216 lines or seniority districts? A. No, they could not nor could they do it without the use of supervisory personnel.

Q. Why is it that they are not able to do so, Mr. Wyckoff? A. Most of the jobs in the Accounting Department are jobs quite skilled, requiring quite highly skilled applicants. It takes a considerable period of time to train them and, therefore, it's necessary to use the supervisory personnel to do the work or use the individuals that are available and let them cross seniority districts in order to do the work.

Q. What steps, Mr. Wyckoff, to your knowledge have been taken to secure personnel for the Accounting Department? A. We have attempted to recruit personnel from other railroads, people who are furloughed on other railroads. We've attempted to recruit personnel locally.

Q. Earlier, Mr. Wyckoff, we mentioned, as an example, the Rate and Division Clerk. Is this a person in the Accounting Department? A. Yes, he is.

Q. Could you tell us specifically—

The Court: What person are you talking about?

217 Mr. Devaney: Rate and Division Clerks, Your Honor.

The Court: Yes.

Mr. Devaney: Could you tell us—

The Court: I have difficulty hearing you about half the time. As I told you before, you have a very soft and pleasant voice but not one that carries out very far.

Mr. Devaney: I'll try to speak a little louder, Your Honor.

The Court: The last time you said that you had a throat ailment. This time, I hope—

Mr. Devaney: No, it isn't that. I can't blame it on anything but me.

The Court: All right.

By Mr. Devaney:

Q. Can you tell us, Mr. Wyckoff, specifically with regard to the Rate and Division Clerks, what steps were  
218 taken to provide the needed scope employees for this work? A. Yes. We—well, for one thing, we contacted the Central of Georgia Railway, who some months ago had a reduction in force. We thought perhaps there were some furloughed Rate and Division Clerks there that we could contact. I personally spoke to the Director of Personnel of the Central of Georgia and he contacted various individuals, not only in this craft but in all crafts; but because of their Union affiliations, they would not come to work for us.

We also contacted the S&A Railway, the Director of Personnel on that road. In fact, we sent a man from St. Augustine to the S&A Railway to solicit personnel.

When we found that we couldn't secure experienced personnel, we had to train our own so we recruited three individuals who had some background in tariff work. We took a supervisory man and put him full time with these three individuals in an effort to train them, but that's quite a prolonged process.

I believe the Government has recognized it takes at least two years to train a Rate and Division Clerk.

Q. What has the prior experience of the Railway been with regard to the period of training required for a Rate and Division Clerk, Mr. Wyckoff? A. Well, in the  
219 past, it has taken several years to train a man.

Now, based on intensive training such as we are engaged in at this time, I would say a minimum of two years.

Q. Now have similar steps been taken with regard to all of the different positions in the Accounting Department? A. Yes, we are attempting to train individuals to fill those positions.

Q. And why is it still necessary to use supervisory personnel to perform part of this work? A. Because the individuals that are in the process of being trained simply can't do the work themselves. They don't have sufficient experience to do it, experience and training.

Q. Now, does the, or would the lack of your ability to fully conform with the agreements, if you could only use the people you had, would this have any impact on the operation of the Railroad? A. Yes. You're speaking now of strictly the scope employees?

Q. Right. If you were able to use the scope employees that you have only in strict accord with the agreements and you were not able to use scope employees across  
220 seniority districts or to use supervisory people to perform some part of this scope work, what impact would this have on the operation of the Railroad? A.

Well, much of the work in the Accounting Department, a good percentage of the work, would have to remain undone. And of course, obviously that's the means by which we secure the revenues to continue operation.

Q. Does the Accounting Department handle any other reports? A. Yes, there are various Governmental reports, ICC reports, that the Accounting Department prepares at various times of the year.

Q. Now, in the Personnel Department, I notice that you had two scope employees prior to the strike. You now have three and you bulletined one position.

Could you tell us what the reason for the increase in the number of people in the Personnel Department is? A. Well, I've transferred some of the work from other departments to my department, as I have a right to do under the Clerk's agreement.

Q. And this is the reason, then, for the— A. The increase in personnel.

Q. —the increase? A. That's correct.

221 Q. Now, in the Personnel Department, I notice that you bulletined one job. Did you have any response to this bulletin? A. No, we did not.

Q. Now, how is the work for which you issued this one bulletin now being performed? A. By supervisory personnel.

Q. If you had obtained this one additional person, would the scope work in the Personnel Department all be performed in accordance with the agreement? A. Yes, all the scope work. Of course, much of the work in my department is of an excepted nature and I have a right to have the excepted personnel perform it.

Mr. Devaney: I ask that this be marked for identification as—

The Clerk: II.

(... The referenced material was marked Defendant's Identification Exhibit II.)



By Mr. Devaney:

Q. Mr. Wyckoff, I hand you a document marked for identification as Defendant's II. Would you tell me, sir, whether this document was prepared under your  
222 direction and supervision? A. Yes, it was.

Q. Could you tell us, without going into any of the details, but purely for identification, what this exhibit consists of? A. It shows the total number of applicants that we've had by months, commencing with January of '63; those selected for processing; those actually hired, and those which failed to report after they were hired.

The Court: That's in all departments?

The Witness: Total for the Railroad, yes, sir.

Mr. Devaney: I move that Defendant's Exhibit II be received in evidence.

The Court: Have you given these gentlemen copies?

Mr. Devaney: Yes, I have, Your Honor. They are now looking at them.

Mr. Milledge: If I might ask a couple questions on voir dire.

223 The Court: Well, would you want to wait until Mr. Shapiro gets through reading it?

Mr. Milledge: Oh, yes, sir.

The Court: As soon as he's ready, why, you can go ahead.

Mr. Shapiro: I'm ready, Your Honor.

The Court: All right, proceed, Mr. Milledge.

Voir Dire Examination

By Mr. Milledge:

Q. Does this come from payroll records? A. No. These people were not on the payroll, in some cases. These are the total applicants, in the first column, so they not all would be on the payroll.

The next column shows those selected for processing from those applicants.

The next column shows those hired. Now, those are the ones who would appear on the payrolls.

and the last column shows those who failed to report.

Q. None of this—

224 The Court: After being hired?

The Witness: That's right, sir.

By Mr. Milledge:

Q. But it doesn't show this: You have an asterisk on here. This does not show former employees who returned; is that it? A. That's correct. These are just new people.

Q. How many former employees do you have? A. Oh, I don't have the figures.

Q. Non-ops? A. I don't have the figures with me.

Q. Would it be the difference between 308 and 390; is that it? On BB? Is that what— A. No. You see, 308 is just for the year '64 that were hired. There were 542 hired in '63. Now, simply because we hire a man doesn't mean that he's going to remain with us permanently. So not all of the people that we hire are still in the service.

The Court: Actually, only 390 are in service, according to Exhibit BB; isn't that right?

The Witness: That's correct, sir.

225 By Mr. Milledge:

Q. From what records was this compiled? A. From our application forms, our records of individuals sent to the doctor for examination, payroll records, those that actually reported and appeared on the payroll; all the records we had available.

Q. Well, this tabulation was prepared for this hearing? A. That's correct.

Q. You haven't been maintaining this tabulation as a tabulation from the beginning of the strike? A. No, I have not.

Mr. Milledge: That's all the questions I have on voir dire.

## Further Voir Dire Examination

By Mr. Shapiro:

Q. Was this prepared under your direction? A. Yes, it was.

Mr. Shapiro: I have nothing else.

The Court: The source of the material is various records but you are sufficiently familiar with the records and with the exhibits to offer it as a correct and true statement of what it purports to be?

226 The Witness: Yes, sir. We took each application form that we had accumulated over the period.

The Court: It took time to assemble it—

The Witness: That's right.

The Court: —and make some notes and then finally put it in final form?

The Witness: That's correct.

The Court: You think your records on detailed examination would substantiate it?

The Witness: Yes, sir.

The Court: Is there an objection to the exhibit?

Mr. Shapiro: No objection by the Government.

Mr. Milledge: No objection.

227 The Court: Mark it in evidence as II.

(Thereupon, Defendant's Identification Exhibit II was received and filed in evidence.)

The Court: Is this in mimeographed form?

Mr. Devaney: No. I do have one extra copy of it, Your Honor.

The Court: Well, I don't want to take copies you need. You may want this for your examination. I just thought, if you had it in the same form as the earlier one, BB, I could have it.

Mr. Devaney: This is an extra copy, Your Honor. I have one left.

The Court: This isn't needed?

Mr. Devaney: No, that is not needed.

The Court: For your examination of the witness?

Mr. Devaney: That's correct.

228 The Court: Or opposing counsel.

Further Direct Examination

By Mr. Devaney:

Q. Now Mr. Wyckoff, I notice—

The Court: This also shows in the number—well, the number of applicants isn't broken down into ops and non-ops but it shows the number selected, both ops and non-ops, and number hired and number failed to report?

The Witness: That's correct, sir.

The Court: Actually, in this hearing, we are only concerned with the non-ops column.

The Witness: Those actually selected and hired, yes, sir.

By Mr. Devaney:

Q. Now, Mr. Wyckoff, I notice that the number of applicants that you had varies from 8 in February of 1963 to a maximum of 121 in August of 1963.

I note that in January of 1964 you had 242 applicants and in February of 1964 it had dropped to 51.

229 Do you have any knowledge, from the people who did report or to whom you have talked, as to what would account for this rather precipitous drop in the number of applicants? A. Well, from the information that I have secured from the applicants when they come in, apparently each time there is a proceeding involving the former employees returning to work, the applicants lose interest in trying to secure employment with the Railway, figuring it's only temporary employment.

By the same token, when we have a series of acts of sabotage such as dynamiting of the bridges that occurred, and so forth, the number of applicants is drastically reduced.

Q. Now, what is the procedure, Mr. Wyckoff, when people make application, in the first column—in other words, where an applicant comes in, does he come to your office ordinarily? A. The majority of them come to my office. There are a few that are processed on the Southern Zone at the Terminal Superintendent's office, but I see all applications eventually.

Q. Now, after you have examined the applicant and he has filled out the application form, what next is done  
230 with this person before he actually goes to work?

A. Well, those on—those that come through my office, I personally talk to.

First, I insure that they are the type of individual that we want in the employ; not one with a bad criminal record or dishonorable discharge from the Armed Forces, anything such as that would make the individual undesirable and, of course, we would bar him from the service.

After we find that he does meet our basic requirements, then, based on his prior training, skills, and so forth, we fit him into the department that he can best be utilized. Then he is sent to that department to make sure that they can utilize his skills. If they can, they send him back and we send him to the doctor for an examination to make sure he meets our physical requirements.

Q. Now, do the various departments reserve the right to examine and/or test the people that you send over to them?

A. Oh, yes, in practically every case they give them some sort of examination or test to insure that the individual is truthful with respect to his prior experience.

Q. Would this include clerks as well as the craft people, or would it be limited to the craft people who would  
231 be tested? A. No. For example, an individual endeavoring to secure employment as a stenographer, naturally, a test would be given to insure that the individual could take shorthand and type, and perform typing.

Q. Then, after the person passes the physical examination, that person is then ready to be placed on the pay-

roll; is that correct? A. That is correct. He is then referred back to the department and they start him to work.

Q. And these people who fail to report, what does that mean specifically? A. Well, that means, after he completed all of the employment procedures, including the physical examination, we just didn't hear anymore from the individual.

Q. He never came to work? A. That's right.

Q. Now, these who failed to report, are those people included in the number hired? A. Not in the number hired, but they are included in the number selected.

Q. Now, Mr. Wyckoff, if we may go back a moment to Defendant's Exhibit BB, do you still have that before you? A. Yes, I do.

Q. Would you look at the top line, at the Mechanical Department.

Before that, let me ask one preliminary question:

Was the information on Exhibit BB, after it was received from the various departments, actually assembled and put into this exhibit by you, or under your direction and supervision? A. Yes. I contacted each of the department heads, requested the information, and then assembled it in this form.

Q. Now, under the first line of Mechanical Department (Motive Power), under "Manufacture of Bearings" is the figure 6. Is that included in the 82 which represents the reduction of requirements? A. Yes, it is.

Q. Now, also on Exhibit BB, Mr. Wyckoff, the number of individuals on the payroll was as of November 2nd. Since that time, approximately one month, has the total number of employees increased, since November the 2nd of '64? A. Yes, they have.

Q. Could you tell us where they have increased, if you have that, and by how many? A. Well, in the Mechanical Department, we have an additional 5, making a total of 141 now instead of 136.

In the Maintenance of Way, we have 117 now instead of 115.

In the Transportation Department, we have 64 now instead of 57.

In the Accounting Department, we have 41 instead of 42, which gives a plus figure of 13.

Q. So that the total of that column would now be 403, right? A. That is correct.

Q. Mr. Wyckoff, in the Accounting Department again, is this work largely the same as accounting for any other industry? A. No. Accounting in a railroad field is unique. You can hire an accountant who has had some experience on the outside, outside industries, but that simply serves as a basis on which his training can progress with the Railroad.

The various reports and accounting procedures on a railroad, to my knowledge, have no equal in the outside industries.

Q. Now, in the over-all hiring, Mr. Wyckoff, for the entire Railroad, this is all under your department?

The Court: But still, going back to that other thing, there are many accounts that you have to maintain and many reports that you have to make, but it's still  
234 done by accepted accounting practices, isn't it?

The Witness: By practices specified by the Interstate Commerce Commission, yes.

The Court: Yes, sir, but you don't deviate from what an accountant learns to do and how he goes about doing his work in making this accounting?

The Witness: No, sir. But what I was getting at, his experience on the outside wouldn't qualify him as an accountant on the Railroad.

The Court: But this outside experience might make you think that a particular item should go in one account and it would go in an entirely different account, matters of that sort.

The Witness: That's correct.



The Court: He has to learn a different—

The Witness: An entirely different procedure.

235 The Court: —a different theory in practice.

The Witness: That's correct.

The Court: But if he's a skilled accountant, it doesn't take him an enormous period of time, does it?

The Witness: Well, the training period for one who has had prior experience as an accountant obviously would be shorter than for someone who had no accounting experience at all.

The Court: That's what we are talking about, one that knew something about the job, one that knew something about accounting. We're not talking about someone who has been a bricklayer.

The Witness: Well, that's what I was getting at, sir; a man who has had prior experience as an accountant can be trained quicker than one who has had no experience at all.

By Mr. Devaney:

Q. Mr. Wyckoff, is the over-all hiring for the Railroad under your general supervision? A. Yes, it is.

236 Q. Can you tell us, Mr. Wyckoff, whether since the strike began and the Railroad resumed operation, have you ceased your efforts to obtain additional employees for the Florida East Coast? A. No, we have continued our efforts to secure employees.

Q. Now, what is the reason, Mr. Wyckoff, for the decrease in the additional number of employees added, that is, the rate of increase, between what occurred in the early months after you resumed operation in '63 and the rate of increase at the present time? A. Well, of course, in the early months, we didn't have any employees, so many of the jobs to be filled required limited degrees of experience and training. Now, those jobs obviously are easier to fill than jobs requiring considerable training and experience. We are at that point now. We have the jobs that are easy to

fill, they are filled. The jobs that require considerable training and experience, we have individuals training for those jobs but we can only train so many at one time.

Q. And in the course of this training, are they able to perform all of the duties of their job, if they were a  
237 fully qualified person? A. No, they can only perform a portion of the duties and the supervisory men are working with them and have to perform the balance of the duties.

Mr. Devaney: No further questions, Your Honor.

#### Cross Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, you have testified that, on the basis of Exhibit BB—do you have Exhibit BB before you, sir?

A. Yes, I do.

Q. You have testified, on the basis of Exhibit BB, that you had a reduction of requirements in the Accounting Department of 10 employees.

What is the reason for this reduction? A. Well, as I said before, some of the reports that were considered necessary before the strike or were desirable before the strike, we found that we don't need so we just don't prepare the reports.

Other reports are being prepared on the basis of IBM equipment, through the use of IBM equipment, utilizing cards punched or prepared in the Transportation Department. After those cards have served their purpose in  
the Transportation Department, they are forwarded  
238 to the Accounting Department.

Q. When did you acquire these machines that you are describing? A. Well now, the machine accounting bureau has been in existence for a period of several years but it has been a gradual process of moving work to that department.

The Court: Has there been any change—you acquired

these leased, or acquired this IBM equipment, you say, several years ago, which means to me before the strike?

The Witness: That's correct.

The Court: Has there been any change in your accounting methods or procedures since the strike?

The Witness: Yes, sir. We've expanded the equipment that we had. We've acquired IBM—

The Court: What do you mean by "expanded"?

The Witness: By acquiring IBM equipment in the Transportation Department, which we didn't have before the strike.

239 The Court: I thought your previous answer to Mr. Shapiro was that all the equipment was acquired several years ago.

The Witness: No, sir. I said—

The Court: Well, when did you acquire the additional equipment?

The Witness: We acquired the additional equipment in the Transportation Department since the strike began.

The Court: Well, when?

The Witness: Well, the exact month, Your Honor, I can't say but it would be several months after the strike began it was placed into operation.

By Mr. Shapiro:

Q. Are you familiar with the running of the Accounting Department in the Railroad? A. Generally, yes. If you are going to ask me duties of specific jobs, for the most part, no.

240 Q. So you are not familiar with the detailed operations of the Accounting Department? A. In other words, I couldn't explain to you just what each individual has to do in the accounting procedures that he has to engage in to perform that work; but as to the general running of the Accounting Department, yes.

Q. How does that fall under your responsibility in the

Railroad? A. By securing employees for the Accounting Department.

Q. Do you secure employees for all departments? A. Yes, I do.

Q. Are you familiar with the operation of all departments of the Railroad? A. By the same token, generally, yes.

Q. But you have no specialized knowledge of the particular departments; is that right? A. That's right.

Q. And you have no specialized knowledge of the Accounting Department? A. That is correct.

Q. Who is the head of the Accounting Department? A. E. L. Masters is Comptroller.

Q. And is Mr. Masters the equivalent in his position within the Railroad of Mr. Hales for the Mechanical Department, and Mr. Davidson for the Maintenance of  
241 Way Department? A. That is correct.

Q. But you are just testifying here from your—  
The Court: Genius and general knowledge.

By Mr. Shapiro:

Q. —just general knowledge? A. That's correct.

Q. And you're not the head of the Accounting Department? A. No, I'm not.

Q. Are you an accountant? A. No, I'm not.

Q. Do you have any knowledge of requirements for educating accountants? A. I have reviewed some documents which indicate a training period, as recognized by the Government. For example, Rate and Division Clerks. In that manner, yes.

Q. Can you describe the work of a Rate and Division Clerk? A. Yes. He takes the waybill, the total revenue as shown on it, he first checks to make sure that the rate is correct. After he determines that it's correct, he prorates the revenue among the various Carriers that have  
242 been involved in the move of that particular freight  
and apportions that part of the revenue that they are entitled to to them.

Q. Now, are there any other positions that you can describe to us? Describe the duties of, as you have just described the duties of the Rate and Division Clerk? A. Well, sure.

The Car Accountant, for example, he maintains—

Q. That won't be necessary; just answer the question. But you can describe the position of the Car Accountant? A. Yes.

Q. But you just testified a moment ago that you couldn't describe the detailed duties of employees in the Accounting Department? A. Not specifically. I can't, for example, read tariffs, which a Rate and Division Clerk has to do. I can't do that.

Q. You weren't asked whether you could do it. You were asked whether you were familiar with the duties. A. I know that he has to read tariffs, but I'm not familiar with the manner in which he checks those tariffs.

Q. How did it happen that you were familiar with the duties of the Rate and Division Clerk? A. That's one of the positions that we endeavored to secure qualified applicants for.

243 Q. Are you in a general position to describe—

The Court: That's a position he said he went to the Central of Georgia, in Savannah, to get filled. One reason, anybody that's in railroading, that job, Rate and Division Clerk, the name of it describes the duties pretty well.

The Witness: Fairly closely, yes, sir.

The Court: Which isn't always true.

The Witness: That's correct.

By Mr. Shapiro:

Q. What are the 17 positions in the Accounting Department which have been bulletined? A. One was a position of Per Diem Clerk in the Car Record Office, the duties of which consist of establishing and maintaining records of freight cars received from and delivered to connecting Carriers.

Q. Is that basically a clerical job or an accounting job?

A. Well, it requires the ability to determine where a car has moved to on this road. They have to maintain  
244 records of how many days it was at each point, what trains it moved on, and so forth. It's a little more than a strict clerical job.

Q. Is it an accounting job? A. Yes, it's an accounting job.

Q. Well, it's in the Accounting Department? A. That's correct.

Q. You needn't be a bookkeeper or an accountant to fill it? A. Well, that is correct, it's a specialized job.

Q. You needn't be a bookkeeper or an accountant? A. That's correct.

The next job was a Rate Revising Clerk in the Auditor of Freight and Passenger Accounts office. The requirements were a thorough knowledge of freight classifications, rates and tariff interpretation.

Q. All right. A. Also general freight accounting.

The next job was an Accounting Machine Operator. It required a thorough knowledge of railway accounting, mandatory rules, and ability to satisfactorily perform the duties hereinafter described, that is, a complete understanding of all accounting and statistical system, plans,  
245 methods and office procedures, all governed by work performed in the Accounting Department. The individual had to be able to operate various units of International Business Machines, wire panel boards, operate tabulating machines, multipliers, collaters, interpreters, sorters, summary gang punch, and form burster machines.

Q. Mr. Wyckoff, I think we might speed this up if you could just go through your listing now and read the positions. A. Oh, I'm sorry. I thought you wanted to know the duties of each.

All right, the next position is a Rate and Division Clerk. The next position was a steno-investigator.

The Court: What kind of investigator?

The Witness: A stenographer-investigator.

The Court: What's—that's not an accounting position?

The Witness: It's in the Accounting Department, yes. It investigates loss and damage of freight. The individual must know the freight claim rules of the Association of American Railroads.

246 A Freight Claim Agent.

A Chief Time Clerk—Assistant Accountant. That's a combination job.

An Accountant.

An Abstract Machine Operator.

By Mr. Shapiro:

Q. What is an Abstract Machine Operator, briefly? A. Well, he—the duties of this position include preparation of interline abstracts, correction accounts or other documents, calculating, adding machines operation incidental to compilation audit of interline accounts, typing, statistics, statements, and so forth. He abstracts or take the information from various reports and puts it in the proper form for these accounts.

A Calculating Machine Operator.

A Head Refrigeration Clerk.

An Overcharge Claim Investigator.

An Accounts Clerk.

An Assistant Head Rate and Division Clerk.

A Suspense Accounts Clerk in the interline and agency accounts bureau.

And an Accounting Machine Operator.

I believe that's all of them, unless I missed one.

Q. Now, you have also testified about the Personnel Department and stated that personnel requirements had been increased in that department by one.

When did that increase take place? A. Well, it has been a gradual increase of work.

The Court: Well, it couldn't be a gradual increase of one.



The Witness: Sir?

The Court: He asked you when it took place.

The Witness: What I was getting at, sir, there has been a gradual increase of work.

The Court: He didn't ask you what brought it about. He asked you when it took place.

The Witness: Well, I advertised the job on November the 2nd, I believe.

By Mr. Shapiro:

Q. I see. This is just a new requirement, November 2nd? A. That's when the job was bulletined, yes.

248 Q. This is not a pre-strike requirement? A. That's correct.

Q. What is the job? A. It's a combination job. It handles the accounts of the Timekeeping Bureau. It also does calling, crew calling.

Q. That's not connected with the strike, though? That's not a product of the strike, I take it? A. No.

Q. Now, Mr. Wyckoff, you testified—well, Exhibit II, do you have that before you, the chart? A. Yes, I have.

Q. Have you had any trouble—I'm sorry, please strike that.

How do you invite applications? A. Many, most of our supervisory people in their contacts around communities in which they live, spread the word that we need applicants, that we need people on the Railroad. By that means; by personal contacts; contacting businesses, and so forth, to see whether they have any surplus personnel or personnel that they are not using; by those means we, from day to day, attempt to get additional people.

In addition, I have contacted the personnel representatives of the various railroads that I come in contact with to see if they have any furloughed people who they  
249 could refer to us.

As I mentioned before, the Central of Georgia had a drastic reduction in their employment requirements. I

contracted Mr. Certain, who is Director of Personnel of the Central of Georgia, and told him the various classes in which we needed individuals and he made an effort to secure individuals for us. But as I understand it, my later contacts with him, the Unions discouraged anyone coming down to work for us.

Q. Do you advertise for applicants? A. You mean in the newspapers?

Q. In newspapers, trade journals? A. No, we haven't.

Q. Do you have any standing procedures for inviting applications, other than your informal contacts as you have described them? A. No, that has been the standard procedure.

Q. Just informal contacts? A. That's right.

Q. Have you ever had special hiring agents help assist you recruiting labor force? A. To my knowledge, no.

Q. Do you know whether you have had them?  
250 What is the extent of your knowledge? A. Well,

I've worked for this Railroad now since '48 and in that time we have never had them.

Q. So your answer is no, that there are no special hiring agents? A. To my knowledge, since '48, we have not had any. Now, prior to that, I can't say.

Q. Is there any reason to suspect you wouldn't know if there were regular hiring agents? A. I would think that I would have known it, and I've never heard of any special hiring agent being employed by this Railroad.

Q. Have you had any difficulty in securing applicants? A. Qualified applicants, yes.

Q. The question is: Have you had difficulty in securing applicants? A. We have, as you can tell from this exhibit, a number of applicants but they don't possess the qualifications in many instances that we can utilize.

Q. Do you interview each applicant for employment?  
A. I talk to each one that comes through St. Augustine.  
yes.

Q. Are some employees hired elsewhere? A. Some, as I said before, are hired on the South end of the Railroad through the Terminal Superintendent's office; 251 but by comparison it's a small number.

Q. When you interview, you ascertain by personal interview the character of the employee; is that what your first object is? A. Well, the first thing we do is secure a written application form from the individual. Then we review that and, based on the questions and answers that he has given, we can tell whether he meets our basic requirements, as to our schooling, as to police record, discharge from the Armed Services, things such as that.

Then I talk to each one and, in many cases, in talking it over with the individuals, I find that they have given us some erroneous answers. For example, their failing to disclose a police record that they actually have, but on the application form they say they have none; things such as that.

Q. Could you tell me again the difference on Exhibit II between the category "Selected" and the category "Hired"? A. Yes. The first column are the total number of applications that we have in each month. Now, from those applications, we select certain individuals to be processed, based on their training, experience, and so forth, and also if they meet our basic requirements. We send them to the doctor. If they pass the doctor, then we 252 actually start them to work.

Q. So the category "Selected" means just people who passed your preliminary screening? A. That's correct.

Q. I see.

Mr. Wyckoff, what is the size of your work force today? A. 403 scope employees in the non-operating crafts.

Q. And how many employees would you need to come into full compliance with the collective bargaining agreements? A. Well, we figure now that we bulletined an additional 114 jobs and we would have bulletined a fur-

ther 21 had those jobs been filled, so that would make 135 jobs, somewhere in that vicinity, 135 extra.

The Court: Well, would you take 13 off of that for the ones you filled since November 2nd?

The Witness: Yes, sir. It would be—

The Court: And end up with 122, actually; wouldn't you? Wouldn't you subtract your 403 from your 525?

The Witness: That's correct, yes, sir.

253 The Court: It would be 122?

The Witness: Yes, sir.

The Court: I gather you are about through. You are going back over prior testimony and looking for—

Mr. Shapiro: Possible inconsistencies.

The Court: It might be a good time to take a break and let you have the witness for a minute when we finish, if you want him; otherwise, you can then turn him over to Mr. Milledge.

Mr. Shapiro: Yes, sir.

The Court: Let's take a break for a few minutes, Gentlemen.

(Short recess)

#### **Raymond W. Wyckoff**

resumed the witness stand and further testified as follows:

#### **Further cross Examination**

**By Mr. Shapiro:**

254 Q. Mr. Wyckoff, do you still have Exhibit BB before you? A. Yes, I do.

Q. Now, do you recall testifying earlier in this proceeding—

The Court: You'd better give him the date. Is it May 26?

Mr. Shapiro: On May 26, 1964. This may have been the 27th session.

The Court: Well, give counsel the page number.

By Mr. Shapiro:

Q. At any rate, it's on—I'm going to refer to the testimony at page 239 of the transcript of May 26-May 27.

Now, at that time, I asked you this question:

"You testified, sir, that if you were required to comply with the collective bargaining agreements, you would be compelled to reduce the service approximately 50%.

"Answer: That's correct.

255 "Question: How do you reach this figure, sir?

"Answer: Well, we have, as I told Mr. Devaney, in the neighborhood of 400 non-operating scope employees working today. Prior to this strike in those classes, not including passenger or LCL freight, in round figures there were a thousand; so that means we would need 600 additional people to comply with the requirements of the various agreements that were in effect prior to October 30.

"Now, that's just about 50%."

Now, was your testimony this morning—

The Court: Well, first of all, as a technical matter, do you recall giving that?

By Mr. Shapiro:

Q. Do you recall? A. Basically, yes.

Q. Would you like to look at the testimony? A. If I might, yes.

Q. Just the portion I read you, sir. (Handing  
256 transcript to the witness) A. I was going back a little ways.

Q. I think you can review it with your counsel. I just want you to look at the portion that was read to you, on pages 239 and 240. A. (Returning transcript to counsel)

Q. Now, which testimony is accurate, sir? The testimony that 117 jobs are needed to comply with the collective bargaining agreements or your testimony last May that you needed 600 additional people? A. At that time, that was based on an estimate made to the best of my ability. This testimony today is based on a check with each de-

partment as to their actual needs to bring us into compliance with the agreements.

Q. So that, when you testified last May, you didn't know what their actual needs were? A. That was an estimate.

Q. Did you know what their actual needs were? A. Well, as I explained at the time I gave that, I simply subtracted the number of employees we had then from the total we had prior to the strike.

Q. Now—

The Court: I have just one suggestion, Mr. 257 Shapiro. 122 is what I got to be the additional number to be in full compliance. That's the difference—

Mr. Shapiro: I think, in the light of the adjustments that have been made in the testimony, I think that is right.

The Court: Yes, 122. It would have been the difference between 390 and 525, but there were 13 additional put on since November 2nd, which would mean the difference between 403 and 525, or 122, rather than 117, which was the figure you gave him. That's the only change I note.

By Mr. Shapiro:

Q. Now, were you present in the Courtroom when the testimony was given about the reasons for reduction of requirements in the Mechanical Department, the Maintenance of Way Department, Communications and Signals Department? A. Yesterday, yes.

Q. And this morning? A. Yes.

Q. And did you hear the description of the labor-saving machines? A. Yes, I did.

258 Q. Now, had some of those machines been operating at the time you testified? A. Well, for example, the "hi-rail" trucks had been operating, but we hadn't had very much experience with them up to the time I testified. And additional equipment was added to those "hi-rail" trucks in order to give us greater efficiency with the manpower we had.

Q. But there were labor-saving machines operating at the time you testified, weren't there? A. Yes, there were some.

The Court: Well, the testimony is that all of them were bought in December and all were acquired by January and they were fully tooled up and operating by March, so that they were, all 12 of them were operating in May; isn't that correct?

The Witness: That's correct, yes.

The Court: All right.

By Mr. Shapiro:

Q. Now, that's one category of machines. I take it that there were other labor-saving machines which have been, which were in operation at the time you testified; is  
259 that right? A. Yes, we've had labor-saving machines back many months.

Q. So that your statement—well, strike that.

Now, turning to Exhibit II, you have testified in connection with that that you have a screening program followed by a reference to the operating department of the employee who is selected, followed by technical testing, followed by physical examination; is that right? A. Basically, yes.

Q. Now, have your standards for hiring employees changed since the time that the strike began? A. Probably the procedure that they are put through is a little different but the standards are about the same.

Q. Do you recall this testimony that I shall read to you from the transcript of May 26-May 27 in this proceeding on pages 246 and 247? I'm beginning to read at line 23 on page 246:

"All right, prior to the time of the strike, according to Mr. Thornton's testimony, most of your employees had grammar school education. Let me refresh you on it, if I may:



260      “ ‘We are now employing only people with high school education with lessons in lab class, whereas before they had grammer school.’

“Now, you were able to run a railroad with the people you had with the grammar school educations; were you not?”

And the answer was:

“Perhaps not as efficiently as it’s being operated today.”

Now, my question is, in the light of Mr. Thornton’s testimony as read to you—you may want to examine this before I go on (handing transcript to the witness), beginning at line 23 on page 246. A. (Witness examining transcript)

Q. Have you increased your standards for hiring employees? A. No. In fact, I think probably in some cases they are a little more lax than they were before.

Q. So that Mr. Thornton’s statement was in error? A. No, it wasn’t.

Q. But you have it both ways, that is, you have not increased your standards and yet you are only hiring  
261 employees with high school educations? A. Well, could I give a full answer?

Prior to the time of the strike, unless an individual had prior railroad experience, it was a requirement that he have a high school education. Today, we can’t get employees for the most part with prior railroad experience, so we’re still maintaining the requirement of a high school education.

Q. You say that you are maintaining the requirement that they have a high school education, but you are not employing people with high school education because of, because you have relaxed your standards; is that what you’re telling me? A. I don’t follow your question.

The Court: No, that isn’t it. I think you misunderstood him.

What he said is that their requirement before the strike was for people without prior railroad experience that they have at least a high school education; in other words, that the only ones that they took with less than a high school education were ones with prior railroad experience. He says that now they have been unable to attract or employ people with prior railroad experience, so that they

262 are maintaining, as to the new employees, the requirement that they have a high school education since they are people without prior railroad experience.

The Witness: That's correct, Your Honor.

The Court: But that there has been no change, except that now, by reason of the strike conditions or for other unexplained reasons, they can't get railroaders with prior experience to go to work for them.

I have no other comment. I think you misunderstood him.

Mr. Shapiro: I think I did, Your Honor.

I think that's all that I have at this time, Mr. Wyckoff.

#### Further Cross Examination

By Mr. Milledge:

Q. Mr. Wyckoff, among all your charts here, you haven't included the month-by-month figures of total non-operating employees hired during—on a month-by-month basis; have you? A. Yes, Exhibit II—

263 Q. Excuse me. Let me withdraw the word "hired". In your employment, that is, the total non-operating people in your employment month-by-month? A. No. I don't have that.

Q. Do you have those figures with you? A. No, I do not.

Q. Well, the broad picture that you have given so far, as I take it, is that you are constantly trying to recruit and you have been trying to recruit right along? A. That's correct.

Q. All right. Now, I submit to you the truth of the fact is that, since about last January, you have had approximately 400 people in the non-op capacities and you have maintained a level rate of employment since that time; is that not the case? A. We've had to recruit people to replace ones who have droppd out, and we've had to train those that we have presently in the employ in order to move them up into the positions that have been bulletined, for example.

Q. You recall, of course, Mr. Thornton's testimony, which has been referred to a number of times, before the Defense Board, in October of 1963, to the effect that you had approximately reached your full man-power requirements at that time? You remember the gist of that testimony?

264 A. In general terms, I do, yes. It has been quite awhile ago now.

Q. All right. So that essentially you have had this 400-man non-op force since at least the early part of 1964? A. I won't say we've had 400 but, as I said before, we try to train the ones that we have and obviously the training process is a prolonged one.

Q. You've reached what you considr to be a satisfactory static number of employees at about 400, and you've been holding that; isn't that essentially true? A. We haven't gone too far over the 400 figure, because of the training process, that's true.

Q. Well, you reached it somewhere in the early part of this year, a satisfactory employment rate to the Company, and you have held it since that time? A. Well, actually you're twisting the words, Mr. Milledge. The truth is that the people that we've hired for the most part weren't trained. Now we've had to train them with the supervisory people that we have, and also have the work performed in part by the supervisory people.

Now, obviously you can only train so many at one time and that's what we are engaged in doing now.

Q. What contracts have you been operating—or  
 265 what working arrangements have you been working  
 under during '64 up to the present time? A. At the  
 present time, we're working under the old contracts to the  
 extent possible.

Q. All right. And you are working your men, up to now,  
 until this Injunction goes into effect, you are working  
 under what? The "Conditions of Employment"? A.  
 Right now we're working, to the extent possible, in con-  
 junction or in connection with the terms of the old contracts.

Now, we have had to have some supervisors perform  
 work, simply because we didn't have sufficient skilled per-  
 sonnel to do it.

Q. Just what are you working under? Just answer the  
 question.

The Court: That's permissible under the contract.

The Witness: No, sir.

The Court: I thought it was.

The Witness: No, sir.

By Mr. Milledge:

266 Q. Well, supervisors can do some types of work?  
 There are some exempt functions? A. Not scope  
 work.

Q. Well, they have—you told us about, for instance, in  
 your office a lot of work is so-called exempt work. A. That's  
 specifically excluded—

Q. All right. A. —in the agreements, in the terms of it.

Q. And you call those people supervisors? A. They are  
 exempt employees, not necessarily supervisors.

Q. But let's go back and—I don't believe we got an  
 answer to the question:

You have been working these people under what working  
 arrangement? It is the "Conditions of Employment"? A.  
 We were working under the "Uniform Working Agree-  
 ment" and, on November the 13th, we changed all the rates  
 of pay, all the conditions, the working conditions, in con-

formity with the old agreements, with the exceptions that I've enumerated—having supervisory personnel do the work in some instances, crossing of craft lines in some instances.

Q. On November 13th of this year, you mean?  
267 A. That's right.

Q. And this "Uniform Working Agreement" is essentially the same thing for the non-ops as the "Conditions of Employment"? A. Essentially, yes.

Q. Yes. So, up to November 13th, you've been manning the working arrangements, you've been manning the uniform working agreement or "Conditions of Employment"?  
A. Uniform working agreement, yes.

Q. All right. And the rate—the number of people in your employ has remaind, in the non-ops categories has remained essentially static since the early part of 1964?  
A. Attributable to—

Q. Well— A. —the training procedure, yes.

Q. Just—you haven't furnished us any month-by-month data, just so the record is clear, the approximate gross number of non-ops, people in non-ops capacities has remained essentially the same since the early part of 1964?  
A. I would say that's essentially a correct statement.

Q. Right. So that your testimony, back here in May, that you had approximately 400 non-operating scope employees in the non-operating categories is, you say  
268 essentially true? A. That's right.

Q. Now, in this Exhibit II, this column, the last column, "Failed to Report", should actually be between "Selected" and "Hired"? In other words, it's not a deduction from "Hired"? A. That's right.

Q. And the way you've got it set up, it might appear that "Failed to Report" was an additional deduction from "Hired", and that's not the case? A. They are in addition to the "Hired". They didn't actually show up on the payroll.

Q. Does "Hired" include "Failed to Report" or not?  
A. No.

Q. Now, let's go back to this on BB, Exhibit BB:

You've got your columns—Column 6 is the one, your jobs that were bulletined, 114 jobs. How many of those bulletined jobs did you fill? A. You mean with people presently in the service?

Q. How many of the bulletined did you receive bids on and award jobs? A. Well, I received bids from three of the striking employees—

Q. Just— A. —and from—sir?

269 Q. Go ahead. A. And from several of the employees in the service; just how many from employees in the service, I don't have those figures with me.

Q. Well, essentially all of them; isn't that true? A. No. Oh, by no means.

Q. Well, how many did you fill? You filled a substantial number of those jobs? A. No, not a substantial number by any means. We filled some of them from employees presently in the service who were qualified to take the jobs.

Q. Well now, you have 52, according to Mr. Hales and this chart—is that his name? Hales? A. That's right.

Q. Mr. Hales. You had 52, you bulletined 52 jobs in your Mechanical Department? A. That's right.

Q. How many of those have you awarded? A. As I say, I don't have the figures with me but it was by no means 52.

Q. Did you not award those 52 jobs to the 52 apprentices?

A. No, we didn't.

270 Q. And you don't intend to do that? A. Not until they are trained to take the jobs, no. We're not going to award jobs to someone who is not qualified to take the jobs.

Q. Now, does this—do these totals here include trainees? A. Which totals do you have reference to?

Q. Any of them on BB? A. You mean the people presently working in these various classes?

Q. Yes. A. Yes, they include trainees.

Q. In other words, this 390 figure includes trainees? A. That's right.

Q. And the way you work a man as a trainee for a period of time and then he becomes an apprentice, let's say, in Motive Power, and then he becomes—then he is awarded a journeyman's job? A. No. We put him in the apprentice training program, based on his qualifications, the prior qualifications. The apprentice training program in the shop crafts, for example, is four years.

Q. Well, just so we don't have a confusion in terms, is an apprentice the same thing as a trainee? A. Yes.

271 Q. You don't have separate categories of trainees? They are all— A. Not in the shop crafts, no; they are apprentices.

Q. Now, you have awarded jobs, journeymen's jobs, to apprentices, have you not? A. To some who had acquired sufficient skills to assume the jobs, a job that was bulletined, yes.

Q. Do you know how many you have done that with? A. No, as I said, I don't have those records with me.

Q. But you say that's—when a job is bulletined, it's bulletined out of your office? A. That's correct.

Q. And when a bid is made, the bid goes to your office? A. That's right.

Q. And the award is made by your office? A. After checking with the department that's involved, to make sure the individual has the qualifications to assume the job, right.

Q. So that, of these 114 jobs, some have been awarded? A. A few, yes; relatively few.

Q. How many? A. As I say, I don't have those 272 figures but it hasn't been anywhere near 114.

Q. Do you want to give us some kind of an estimate? A. No, because I'm not in position to; but I do know it hasn't been anywhere near that figure.

The Court: Well, wait a minute.

This 13 that you gave us earlier, wouldn't that be the number?



The Witness: No, sir. Those were 13 additional people who have been hired.

The Court: All right. Hired since the jobs were bulletined?

The Witness: That's right, since November 2nd.

Mr. Milledge: But not to fill these jobs.

The Court: Not to fill those jobs; is that what you are saying?

Mr. Milledge: That's right.

The Witness: In some cases, they filled bulletined  
273 jobs but not in all cases.

The Court: I understand.

By Mr. Milledge:

Q. Now, the Accounting Department is not your department? A. That's right.

Q. Right. And the Accounting Department presently doesn't have enough people? That's what this indicates?

A. That's correct.

Q. So you're not asking the Court to have people in the Accounting Department go out and do some other kind of work? A. We are asking the Court to permit supervisors to continue as they have had to do in the past to perform some of the work while the people were being trained; and also to permit the crossing of—not craft lines, but seniority districts, in the Accounting Department.

Q. Well, you've told us that you are not in detail familiar with the problems of the Accounting Department? A. With the specific duties of each job, that's correct.

Q. You understand that supervisors are doing  
274 some of the work there? A. I know that from my personal observation, yes.

Q. And from your charts, it indicates that you don't have enough people there? A. That's correct.

Q. And the way you say you have been getting by is by having supervisors do it? A. Train and assist in the performance of the work; that's right.

Q. Now, there is a department—let's see: You testified about the Personnel Department, and I take it you're not asking for any deviations in the Personnel Department?

A. Yes, I have one job bulletin that I've had no bids on, no qualified applicants. And that is being done by supervisory personnel or excepted personnel.

Q. And for how long has that been going on? A. Well, as I said, the job was bulletined on November 2nd. As I tried to explain before, the work load has increased gradually because we are coming into the perishable season now, and it has reached the point where I need an additional job.

Q. What type of person is it in the Personnel Department? A. What type of person?

275 Q. Yes, this job that you don't have filled? A. It works in the timekeeping section primarily, timekeeping and also in crew calling.

Q. What kind of description is that? Job description? What did you say in the bulletin about it? A. Just a minute, I'll read you the bulletin:

"Time Clerk, Bulletin Clerk, Chief Caller." That's the title of the job. Would you like me to read the duties?

Q. Go ahead. A. "The duties of this position consist of verification of time slips of train, yard engine service and station employees under the Rules of the Train Service Agreements, checking against train performance reports, compiling of statistical reports of vacation credits for train, yard, engine service and station employees, assisting in audit of time rolls of other classes of Transportation Department employees and other miscellaneous duties connected with timekeeping and basic payroll account-

276 ing work. Also handling bids from train and yard service employees, maintaining crew boards, advertisements of assignment of vacancies in all departments, calling crews, making reports of train and yard service employees, marked up, cut off, laying off, transferring and reporting for duty from leave of absence, preparing and

distributing bulletins covering job advertisements and assignments for all departments of Railway, and such other duties as may be assigned by the Vice President and Director of Personnel."

Q. This is somebody to work in your office in St. Augustine? A. That's right.

Q. All right. And this is work that has been done by a supervisor? A. It's being done by an excepted person right now.

Q. In your department, you don't have any problems about crossing craft lines. You just want permission to, until you can fill that job, to use an exempt person? A. That's right.

277 Q. And in your department you don't have any problem about apprentice problems, I take it? A. I have a problem getting someone trained for a job, yes, sir.

Q. But you don't have—this person would be under which contract? A. He would be under the Clerks' agreement.

Q. Is there an apprentice ratio provision in the Clerks' agreement? A. No, there is not.

Mr. Milledge: That's all I have.

#### Redirect Examination

By Mr. Devaney:

Q. Mr. Wyckoff, the question was asked earlier concerning the contracting of work in the Maintenance of Way Department, the bridges.

What is the situation under the agreement with respect to the contracting out of such work? A. Well, you always have a right to contract work where you—

Mr. Shapiro: Objection.

278 The Court: Wait a minute.

The Witness: I'm sorry.

Mr. Shapiro: I don't believe Mr. Wyckoff has testified about contracting out of work on the Maintenance of Way.

The Court: I didn't hear you.

Mr. Shapiro: I don't believe Mr. Wyckoff testified about contracting of work in the Maintenance of Way Department.

The Court: I think it was Mr. Davidson.

Mr. Devaney: That's correct, Your Honor.

Mr. Milledge: There is the further objection that this is an opinion in another field and it is certainly not in re-direct of any material covered on cross.

The Court: It's not a matter he testified about on direct or that he was crossed about. Why cover it now, 279 when you had another witness cover it?

Mr. Devaney: Perhaps it would be of assistance if I asked a preliminary question as to his qualifications and familiarity with the agreement, Your Honor; but I believe Mr. Wyckoff is thoroughly familiar with the agreement and as to what the practice is and has been with respect to this work.

The Court: Well, let's go ahead and take it.

The Witness: The Railway has a right to contract out work in any case where it doesn't have sufficient personnel or equipment to perform the work. Now, that's a right that has been upheld by the National Railroad Adjustment Board on countless occasions.

Mr. Milledge: Now, this should be stricken, Your Honor.

The Court: It is stricken. Try to answer the question and not—

By Mr. Devaney:

Q. Again, Mr. Wyckoff, what is the provision of the contract, or what is the situation with the contract itself; not any interpretation of it, with respect to the 280 contracting out of work in the Maintenance of Way Department? A. There is no, nothing in the agreement specifically with respect to contracting of work.

Q. Now, what has been the practice of the Railroad over the years with respect to contracting out of work?

A. Wherever it didn't have sufficient personnel or equipment to perform the work, it was contracted out.

Q. Now, did you say, Mr. Wyckoff, that the other provisions of the old collective bargaining agreements had been placed into effect? A. Yes, they have.

Q. And on what date was this action taken? A. November 13th of this year.

Q. And could you tell us some of the provisions, not detailing all of them but what provisions now are we talking about that have actually been changed in accordance with the old agreements? A. Well, for example, rates of pay have been reestablished that were in effect at the time the strike began; hours of assignment have been established in conformance with the old agreements; to the extent possible, we have maintained craft lines.

281 Q. Now, have the people whose rates were changed in any way been advised of the change in rate? A. Yes. Each one was given individual written notification.

Q. Now, do these represent copies of the notifications, Mr. Wyckoff? (Tendering instrument to the witness) A. Yes, those are the copies I brought with me of the actual notices extended to each individual.

Mr. Devaney: I ask that this be marked for identification as Defendant's Exhibit JJ.

(The referenced material was marked Defendant's Identification Exhibit JJ.)

By Mr. Devaney:

Q. Now, I show you this, Mr. Wyckoff, which has been marked for identification as Defendant's Exhibit JJ.

Again, was a like notice given to each employee in each department where a rate change was involved? A. Yes, it was, a rate change or a change in the hours of assignment.

Mr. Devaney: I move that Defendant's Exhibit JJ be received in evidence. And may I say that the others are here, if anyone would like to look at them. I do not  
282 propose to introduce the other individual notices, since they are all essentially the same in nature and

have the individual rates, job descriptions, hours, and so forth, shown on each of them, if counsel for the Plaintiff or Intervenors would care to examine them.

Mr. Shapiro: Do you have any other copies of this instrument or anything like it?

Mr. Devaney: I don't have any more copies. We will make you one if you like.

Mr. Shapiro: I would like it.

Mr. Devaney: The others are there but they are not copies of this one.

Mr. Shapiro: Perhaps a blank form.

Mr. Devaney: I don't have any of those either, but I will make you a copy of this one.

The Court: JJ.

283 Mr. Milledge: No objection.

The Court: JJ is received without objection.

(Thereupon, Defendant's Identification Exhibit JJ was received and filed in evidence.)

By Mr. Devaney:

Q. Mr. Wyckoff, have persons actually been paid the rates under the old agreements since November 13th? A. Yes, the payroll was changed on the 13th to provide the rates of pay set forth in the old agreements.

Q. And the rate was changed; this would have left in the pay period, how many days, Mr. Wyckoff? A. Well, only the 13th, 14th and 15th, as far as calendar days are concerned; for the most part, only actually one working day, since the 13th was on a Friday.

Q. But their rate was changed for that one day; is that correct? A. That's correct.

Q. Have you brought with you a copy of the payroll? A. Yes; I don't have it here on the stand but I have copies there.

284 Q. Is this the copy of the payroll that you referred to? (Tendering to witness) A. Yes, it is.

Mr. Devaney: Again, I don't intend to introduce this, Your Honor, but it's here if counsel for the United States or the Intervenor would care to examine it.

By Mr. Devaney:

Q. Now, do I understand, Mr. Wyckoff, that pursuant to this change, that these people shown on this payroll were in fact paid at the rate called for under the old agreement?

A. That is correct.

Q. And that you have placed into effect all of the provisions of the old agreement as of November 13th, except these provisions that are covered by our Application? A. That is correct.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: I have just one or two, Your Honor.

Recross Examination

By Mr. Shapiro:

Q. Now, Mr. Wyckoff, when you appointed people to the bulletined jobs, as you testified, referring to the 117 bulletined jobs, some of which were filled from your present employees, you did so on the ground that they were technically qualified? A. That's right.

Q. Now, were they qualified under the collective bargaining agreement? A. You mean, did they go through the full four-year training program?

Q. Yes? A. Obviously not, since most of them were hired since the strike began.

Q. So that you are not complying with the provisions of the collective bargaining agreement relating to the assignment of apprentices to journeymen jobs? A. Well, what we had to do was take the individual and slot him into his proper location in the apprentice program based on his prior experience and give him credit for his training in outside fields. We arrived at whether or not he had completed the four-year training program and, on that basis, we made the assignment.



Q. Well now, are you carrying these people as journeymen? A. Yes, we are.

Q. Are you according them seniority as journeymen? A. Yes, we are.

Q. So that, if liberated from the requirements of  
286 the apprentice ration and the age restrictions on apprentices, you would not only assign apprentices to journeymen's work but you would give them the seniority and the pay of journeymen; is that right? A. Based on their training, yes; training in outside fields before they came to work for the Railroad and the additional training with the Railroad.

Q. Have you requested—well, you answered Mr. Devaney's question concerning the degree to which you had complied with the collective bargaining agreements by stating that you were complying with that in all respects except those respects listed in the Application for Approval of Employment Practices; is that right? A. That's correct.

Q. So you are familiar with the Application for Approval of Employment Practices? A. Yes, I am.

Q. I show you a copy of the Application. Would you show me where in the Application you request leave to assign apprentices to journeymen positions, according them the pay and seniority of journeymen? A. Pay and seniority of journeymen?

Q. Yes. A. I think we can, under the agreement,  
287 we have a right to assign a man as a journeyman when he has completed the apprentice training program.

Q. Would you answer the question, please? A. I thought I had. I thought the agreement afforded us that right, therefore, we didn't have to deviate from the agreement in that respect.

The Court: What you are saying is that carrying them yet as journeymen and giving them seniority as journeymen is no deviation from the contract?

The Witness: As I interpret the contract, yes; as I interpret the contract.

The Court: So that there was no need to include it in the Application for Relief here?

The Witness: That's correct.

By Mr. Shapiro:

Q. Now, what is that provision which you rely on? A. Well, it's the Apprentice Rule, Rule 32 of the agreement.

Q. Which agreement is it you are referring to? A. Shop Craft Agreement.

288 Q. And what is the provision in Rule 32? A. Well, it specifies the requirements for apprenticeship.

The Court: Are you quoting it from memory? You're not reading it, are you?

The Witness: I have it right here, Your Honor.

The Court: Oh, all right. Go ahead and read it then.

The Witness: Paragraph (a) is the age limit requirement, which we ask for deviation.

Paragraph (b) says:

"An apprentice will be required to serve eight (8) periods of one hundred thirty (130), eight (8) hour days of service each, overtime excluded or 8,320 hours."

And as I said before, giving him credit for his service in outside comparable fields, we have slotted them into the proper position in the apprentice training program and upon completion of the additional time with the Railroad, we afford them seniority as a journeyman.

289 By Mr. Shapiro:

Q. So that you are claiming then that, so long as there is—as long as the employee has equivalent apprentice time in prior employment, you can, under the agreement, credit that before you assign him? A. That is the interpretation I place on it, yes.

Q. Now, is this true for other labor organizations? A. Well now, I don't know.

Clerks, for example, don't have any apprentice training program.

Q. It's primarily a matter for the shop crafts? A. Primarily, yes.

Mr. Shapiro: I have nothing further, Your Honor.

#### Further Recross Examination

By Mr. Milledge:

Q. The use of supervisors to do scope work actually saves you money, does it, Mr. Wyckoff? A. I don't know whether it does or not, really; we need the supervisors to supervise the work. You are not accomplishing the purpose for which a supervisor is there if he's doing the work himself.

Q. Now, under the agreements, if you kept your work force low, this is assuming you had no deviation from  
290 it to the point where from time to time there was extra work and you performed it with supervisors, the men presently in the employ would have a claim for time and a half; would they not? In other words, that they had lost their overtime work? A. If they were qualified to perform the work the supervisor performed, I would say yes.

Q. So, if you are permitted to use supervisors, you can avoid any time and a half claims? A. I really don't think the time and a half claims are involved because, as I said before, the supervisors are doing the work that the people are not trained to do themselves, not skilled to do themselves. And certainly an individual who wasn't skilled to do the work wouldn't have any basis for a claim.

Q. Well, there are plenty of people who are skilled to do the work in all of your departments now; are there not? A. Plenty? No.

Q. Well, there are a number of people in each department who are? A. We have some in each department who are skilled, yes.

Q. Yes. And if you are now allowed to use super-  
291 visors, any time that you did use a supervisor, that

is, if you are not allowed to do so by the Court, any time you did use a supervisor, you would be subject to a time and a half claim by one of the qualified personnel who didn't get overtime; isn't that true? A. Of course, we are subject to claims for practically anything we do so, as far as being—

The Court: Try to answer the question, please.

The Witness: I'm trying, Your Honor.

The Court: All right.

The Witness: I would say that we possibly could receive claims, but I don't think there would be any basis for them since the individual would already have performed his work and this would be on another job.

By Mr. Milledge:

Q. Just so it's clear:

Before the strike and when you had your full employment, if you used a supervisor to do scope work, you would get a time claim and be obliged to pay a time claim  
292 for time and a half; would you not? A. Well, that's right, but the supervisor would then do the work that the individual would have done on overtime—

Q. That's right. A. —on his job.

Q. Right. A. Now, if he's skilled, he's doing the work on his job and the supervisor is performing the work that an unskilled man would perform on another job.

Q. So, by keeping your man power down to 400 and having supervisors do the extra work from time to time, you avoid time and a half payments; do you not? Or time and a half claims? A. Claims possibly, yes; I can't say when we get claims but payments, I would say no because I don't think there would be any basis for the claim.

Q. You say, at the present time, based on the assumption that you don't have enough people—isn't that right? A. Skilled people.

Q. Yes. So, using supervisors does actually result in a savings to you of not paying time and a half? A. Well,

once again, I say that the supervisors are there for a purpose, to supervise the work, and if we are using them  
 293 to do the work themselves, obviously they are not performing the work that we have them there for in the first place.

Mr. Milledge: I have no further questions.

Mr. Devaney: I have nothing further, Your Honor.

The Court: There's one other matter. I don't know what it has to do with this hearing but, under date of November 17, I received a communication from the President of the United Transport Service Employees, Mr. George P. Sabattie, complaining of notice to the members of that organization covering porters and another notice—one is train porters and No. 7 is—well, I suppose they are the two. I don't know whether there are two separate contracts referred to in the Complaint or—

Mr. Milledge: Yes, sir. I believe Train Porters and Dining Car Attendants.

The Court: Well, maybe that's what it is.

The United Transport Employees are repeated twice in the Complaint.

294 The Witness: Your Honor, they represent—

The Court: One of them being Redcaps and the other being Train Porters. They are separate contracts?

The Witness: That's right.

The Court: In his one Union as to both.

Anyhow, what this gentleman sent this material to me, showing me the Notice that has been sent to "each of our members employed as a Train Porter or Redcap for the Carrier. We are sure you did not intend by your Order of October 30, 1964 to bring such a result."

It goes on to say:

"The Union has not been taking part in the strike. They are not a striking Union. They are people out of work by reason of the strike and the elimination of passenger service."

And the Notices, I'm sure you are familiar with, they are under your signature, Mr. Wyckoff.

295 The Witness: Yes, sir.

The Court: That in order to comply with this Court's October 30 Injunction in this case and comply with the prior agreements, that the Notice was given them that they have lost seniority and their employment relationships with the Railroad are terminated. He goes on to say in his letter that they are not in position to engage in expensive litigation:

"We appeal to you therefore for help in correcting the situation which is obviously unjust in violation of the spirit of your Order."

Of course, it says that if I have any suggestion of any kind, they will be glad to follow it, and

"We hope you will help us."

Well, it is not my function to act on letters from people. It's not my function to give people legal advice. I simply wrote him, acknowledging his letter and telling him that this matter is coming on for further hearing on this date, and at that time I would bring his communication to the attention of counsel. At that time, I furnished copies of

the communication to Mr. Shapiro and to Mr.  
296 Milledge. I didn't to you, since I gathered from what he sent me that you have it anyway.

The Witness: Yes, sir. I wrote the letters.

The Court: And I give it to the Clerk. He can put it in the file. I don't know what should be done about it.

As I say, it's not my law suit and I'm not Mr. Sabattie's lawyer or the Union's lawyer. I can't advise him and I'm not trying to tell anybody here what to do, but it seems to be a plea for help and I told him I would bring it to the attention of counsel here. Counsel for the United States particularly may want to take some notice of it.

Mr. Milledge, as representing the Intervenor, they are only the eleven striking non-ops that you represent.

Mr. Milledge: Yes, sir.

The Court: And this is not a striking non-op.

Mr. Milledge: No.

297 The Court: This is one that their jobs were eliminated by the strike and by the failure to perform passenger service.

Mr. Milledge: Yes, sir.

The Court: And this Rule says that, if they haven't worked in twelve months, they are out of a job. And that's what this Notice accomplishes.

Mr. Milledge: I believe one of the eleven of the non-ops Unions is the dining car employees, who received a similar letter, which we will take up in our case.

The Court: You will not?

Mr. Milledge: Will.

The Court: I see.

Mr. Milledge: So whatever is done about that, I presume will be the same as the other two.

The Court: Well, suppose we break off at this  
298 point, Gentlemen. I've done what I told him I would do. I've brought it to the attention of all counsel at this hearing and I propose to do nothing else about it, other than as activated or inspired by counsel.

Let's break off until 2:00 o'clock, Gentlemen.

Thereupon, at 1:00 o'clock p.m., on Tuesday, December 1, 1964, Court adjourned to be reconvened at 2:00 o'clock p.m., of the same day.

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At 2:00 o'clock p.m., on Tuesday, December 1, 1964, pursuant to adjournment of the preceding session, Court reconvened and the following further proceedings were had:

The Court: All right, sir.

Mr. Devaney: I have prepared, Your Honor, the list which was to be attached to the exhibit that I submitted this morning, Defendant's Exhibit—

The Clerk: GG, I believe.

Mr. Devaney: GG.

Mr. Thornton will be the next witness.



**W. L. Thornton.**

having been produced and first duly sworn as a witness on behalf of the Defendant, testified as follows:

**Direct Examination**

**By Mr. Devaney:**

Q. For the record, will you state your name, please.

A. My name is W. L. Thornton.

Q. And what is your position with the Florida East Coast? A. I'm President of the Florida East Coast Railway, St. Augustine, Florida.

Q. Mr. Thornton, I hand you Defendant's Exhibit BB.

Would you tell us, please, with regard to the transportation department in general, why the—or what accounts for the reduction of employees there of 67, which is shown in column 7 of that exhibit? A. This is a result of several different conditions, one of which is the LCL traffic that we are not handling to the extent that we did before the strike.

The Court: I thought you weren't handling it at all?

The Witness: We are handling it on a permit basis; also a change in our operation, particularly in our agencies.

300 For example, where we have had clerks before doing, preparing freight bills, these are now prepared by Xerox machines from the waybill, eliminating the necessity of typing out the freight bills.

Likewise, many of the reports that we had formerly made are now handled through IBM punchcards. And many of the reports that were required have been eliminated altogether.

**By Mr. Devaney:**

Q. Now, in the Transportation Department, Mr. Thornton, an additional 26 jobs were bulletined.

Did you receive any bids from striking employees for those 26 jobs? A. There was one applicant who bid on the

job. However, he later indicated that he would not come in to work.

Q. How is the work being performed at the present time, Mr. Thornton, which would have been performed if you had had the 26 additional people fill the jobs that were bulletined? A. This is being performed by employees in the scope craft, perhaps in a different seniority district or different craft, performing the work that is necessary to be done, but primarily by supervisory people doing the work; and the same process of trying to train the people that we have employed to do the work.

301 Q. Now, if you could only use the 57 scope employees and could not so utilize the people across seniority districts or to use supervisors, Mr. Thornton, would this have any effect on the operation of the Florida East Coast? A. It certainly would.

Q. And what would that effect be? A. Well, it would have an effect of certainly disrupting the operation of the Railroad. It would affect—in fact, in many instances, it will disrupt it to such an extent it will cause cessation of operations.

Q. Could you give us some specific illustration as to how it might— A. Well, for example, dispatching trains, we do not have sufficient dispatchers and this is now being performed by supervisory personnel, and we have no one sufficiently trained to perform that work. And if a supervisor was not permitted to do this for certain periods of the day, we would not have a qualified dispatcher to dispatch the trains.

Q. Now, on the LCL freight, Mr. Thornton, you say that you are now handling LCL freight on a permit basis? A. Yes, we are handling it on a permit basis.

Q. And how long have you been handling it on a permit basis? A. Well, I do not know exactly when we  
302 started. It's well over a year that we have been handling LCL on a permit basis.

Q. Did you handle LCL freight during 1963 on a permit basis? A. Yes, it certainly was a portion of '63.

Q. Now, are your—is your practice with regard to the handling of LCL freight anymore restrictive than the practice of other railroads in general? A. The trend since the strike has occurred in the industry in general has changed tremendously. In fact, we are handling LCL on a permit basis in many instances that will not be handled in other parts, on other railroads. For example, we gave a permit to handle a shipment of—an LCL shipment from our Railroad to a point on the Pennsylvania Railroad and, after it was loaded and was ready to be shipped to Pennsylvania, they advised that they did not receive shipments of less than 10,000 pounds, so it was necessary, despite the fact that we were willing to handle it, the receiving railroad would not handle it, so we are actually handling LCL on a permit basis to a large extent, providing more service than would be provided on other railroads.

Q. Have you taken any steps with regard to the  
303 tariff concerning the handling of LCL freight? A.

It is our purpose to restore LCL freight and have in order to make ourselves, to provide full freight service and in doing so, we are going to revise our—or have revised our tariff to provide the same LCL service that the Seaboard, which is the other railroad serving this area, provides.

Q. And do you know, do you recall offhand, Mr. Thornton, what limitations, if any, are now imposed by the Seaboard? A. Generally, they provide for the handling of LCL shipments 4,000 pounds, or not less than 4,000 pounds, when loaded or unloaded by the consignee or consignor.

Q. That is the same change that has been made in Florida East Coast's tariff? A. This is correct.

As I pointed out, in other railroads like Pennsylvania, they have set the minimum of 10,000 or 8,000 but we have set it at 4,000, the same as the Seaboard.

Q. Now, Mr. Thornton, in the Freight Traffic Department, could you tell us very briefly what accounts for the reduction of two employees in that Department?

The Court: Which Department?

304 The Witness: Freight Traffic.

The Court: Yes, sir.

The Witness: The reduction there is a result of eliminating reports—or, rather, eliminating the necessity of personnel accumulating this information and converting it into a report. We have changed this and provided this same information through IBM reports.

By Mr. Devaney:

Q. Now, you also bulletined four jobs in the Freight Traffic Department.

Now, who is performing the—well, first of all, did you receive any bids from any of the striking employees for the four jobs that you bulletined? A. We did not.

Q. Now, who is actually performing the work involved in the four jobs covered by those bulletins? A. That is being performed by supervisory personnel to a large extent. Those jobs were primarily rate clerks or quotation clerks, which is a clerk that will look up the rate and quote it for a prospective shipper. This is being done by supervisory people who are able to read tariffs and give this information.

305 Q. Now, if they were not able to so perform, what would be the effect on the operation of the Florida East Coast, Mr. Thornton? A. Well, of course it's necessary, in order to perform the service to the public, to give them rate quotations and to have the necessary information concerning rates for us to carry on the process of our business, and it would greatly detract from the service that the public needs from the Railroad.

Q. Now, have you studied or made any analysis of the over-all operation of the Railroad, particularly if the work which is being performed in the manner that it is now

being performed covering the 114 jobs which were bulletined could no longer be done, as to what the over-all effect on the Railroad would be, Mr. Thornton? A. Yes, sir, I have.

Q. And what would be the over-all effect on the Railroad if it could not operate in the manner that it is now operating with respect to these supervisors and crossing craft lines or seniority districts? A. Well, it would immediately affect the volume of service that we could provide and it would gradually increase, that is, the amount of service that we could not provide. It would actually  
 306 affect the safety of our present employees. It would affect the safety of the public who are associated joining our Railroad. It would certainly affect the service that the public is receiving from the Railroad. And of course, it would naturally also affect the ability of the Railroad to withstand this strike.

Q. Now, do you have any estimate, Mr. Thornton, as to how much reduction in service this would result in, if not immediately, within this period of time that you have described? A. Well, this is difficult to accurately estimate but, from the over-all picture, I think it would be from 30 to 50%. But you must keep in mind that when you have—it's just like a chain with the weakest link, if we aren't able to have one dispatcher to dispatch trains, that's going to affect the entire operation for that period of time. So it could have the ultimate result of completely shutting down the Railroad.

Q. Now, what is the reason, Mr. Thornton, that based on the complete analysis of the departments we have shown on Exhibit BB, that 114 jobs would be immediately required and you have said that this would result in a reduction of service of 30 to 50%; and earlier the estimated number, based on the number that we had in May as compared with the number we had before the strike, was  
 307 600. You said that it would reduce the service by about 50%. Can you tell us why you feel that, even

though 114 jobs are needed upon a closer analysis rather than the estimated number given before, it would still result in the 30 to 50% reduction in service? A. Well, these particular jobs that we are talking about are jobs with the higher rate of skills, people with skills that are absolutely necessary for the continued operation of the Railroad.

Mr. Milledge: Excuse me.

I don't know what particular jobs we are talking about.

The Court: The 114?

The Witness: The 114 jobs, that's right; jobs where we need the experience of trained personnel and experience of supervisory personnel for inspection of the trains and the safety of the trains; where we must have skills in accountings and rates and division clerks. These are the skills that we are lacking. And if we are not able to utilize the  
 308 supervisory people or the people who have these skills possibly in another craft or another seniority district, then the effect on the operation of the Railroad will be the same as the people who they supervise, for example, or who they work in association with.

By Mr. Devaney:

Q. Now, Mr. Thornton, as President of the Florida East Coast, to your personal knowledge, what steps has the Railroad taken since the beginning of operations to secure new employees? A. We have had—the Personnel Department is the one that has the primary responsibility to interview and recruit personnel. Due to the strike, this has fallen over to all of the Departments. Particularly what we have had to do is to go out and—have mechanical people go out and try to locate machinists or electricians that can do their work. Likewise, in the Roadway Department, this was done. The Transportation people did the same thing.

So this has been an effort of all the supervisory people, as far as they can. At the same time, keeping the Railroad operating is their responsibility also, to recruit new personnel. And then, of course, we have gone into a train-

ing program to train these new employees and this has been a continuing effort up until the present time.

Q. Now, has the strike created peculiar conditions  
309 under which the Railroad must attempt to operate?

A. It has. It has created—

Q. Could you tell us specifically what you refer to? A. Well, the strike conditions that we have been faced with and which we are attempting to operate the Railroad under are, for example, attempts to have shippers not ship over the Florida East Coast Railroad. We have had—this is not only locally but on a nationwide basis—soliciting aid from Union members throughout the entire United States. It has resulted in secondary boycotts being placed against—

Mr. Milledge: Excuse me.

I object. This has nothing to do with the matter presently before us. It would have, if it did anything, it would reduce the necessity for men but it is not—this talk about secondary boycotts—

The Court: Objection sustained. The answer is stricken.

By Mr. Devaney:

Q. Mr. Thornton, in the actual recruitment of personnel, has the existence of strike conditions on the Florida East

Coast imposed a problem in securing the qualified  
310 personnel required by the Florida East Coast? A.

Yes, in this respect: Whenever we had a series of dynamitings, we've had a corresponding reduction in personnel that made applications for employment.

Whenever we had any attempts, by whoever it might be, to either fire the present employees or in anyway disrupt the continued employment that they may have in the future, this had a very definite effect to discourage the people to come in and apply for work. And this had had an effect upon our ability to get personnel and particularly skilled personnel. Those—

The Court: These Court hearings are bad.

The Witness: I beg your pardon?



The Court: These Court hearings are bad.

The Witness: Yes, sir, that's correct.

By Mr. Devaney:

Q. What has been the result, Mr. Thornton, of your over-all training program? Has it, by and large, been able to supply the number of fully-qualified people as rapidly as you needed them? A. No, sir, it hasn't.

311 We still haven't been able to obtain sufficiently trained personnel. The training program that we have is working toward this end. The supervisory people we have that do have the skills are training those that they are able to train, but there is a limitation on the amount and the number that they can train and also carry on the necessary duties of the Railroad, and we are still limited in this respect.

Q. Now, except for the limitation of your ability with the qualified personnel you have to continue the training program and still perform the work, have you authorized any reduction or withdrawal from the program of training people as rapidly as you could? A. No, we have not.

Our efforts are still to continue to train personnel just as rapidly as we can.

Q. Mr. Thornton, in the two departments that I asked you about specifically, namely, the Transportation Department and the Freight Traffic Department, do you know whether any of the bulletined jobs were bid by any of your present employees, that is, people who were already working? A. Of my own knowledge, I don't know.

Q. But if they had, this would not have increased your over-all force in anyway; isn't that correct? A. No.

That's correct.

312 Q. And we talked about the 26 jobs which were bulletined.

Do I understand correctly that we are talking about 26 additional employees to perform service? A. This is correct.

And we, of course, as indicated in Column 8, we will need additional trained personnel as the perishable season progresses. And in this respect, we are not keeping up with the demand in the training area.

Q. As of November 2nd, were you at the height of your perishable season? A. No, that is virtually at the very beginning of the perishable season.

Q. And I know you have testified before and I'm not certain whether it was in this proceeding or another.

Could you tell us again approximately when you build up to the height of your perishable season? A. The height will come usually around May.

Q. Around May? A. Right after the first of the year, it picks up to a very substantial level and you'll have a plateau until May, and then you'll hit another peak at that time just before the end of the perishable season.

Q. Now, as of today, you are still in the low point  
313 of your perishable season; is that correct? A. Yes,  
it's beginning to build up. I think we got our first  
car of perishables the last week of October, or right in that  
vicinity, and it has built up now each day until about  
Christmas and then we will drop into a little decline be-  
tween Christmas and the first of the year, and then it  
builds up to—

The Court: There is usually an embargo?

The Witness: Yes, sir, for your citrus; usually there is an embargo. And your fresh fruits will continue through that period.

The Court: A very large part of your perishables is the citrus, isn't it?

The Witness: Yes, sir, this is correct.

By Mr. Devaney:

Q. Now, in the Transportation Department, Mr. Thornton, is there an apprenticeship program in that Department? A. No, there is not.

Q. And is there one in the Freight Traffic Department-  
A. No, sir.

314 The Court: What non-op Union are most of the contracts within the transportation?

The Witness: The majority of them are clerks, and you have the Order, the Telegraphers organization. Then of course, you get into your train dispatchers, yardmasters and, of course, as you get into the passenger area, you are getting into train maids and porters.

The Court: Yes. We are talking about freight now.

The Witness: Yes. That predominantly is—

The Court: Clerks, telegraphers, dispatchers and yardmasters?

The Witness: Yes, sir.

By Mr. Devaney:

Q. In the beginning of the strike, Mr. Thornton, were your employees subjected in any way to any harassment or abuse? A. Yes, sir, the—

315 Mr. Milledge: Objection. I don't think this has anything to do with it. I doubt if that has any bearing on this.

The Court: It may have some remote bearing on this man power business; I don't know.

Mr. Devaney: Your Honor, it has a direct bearing of course on the provision relating to the providing of the seniority lists.

The Court: All right, go ahead.

The objection is overruled.

The Witness: In fact, in the beginning of the strike, almost everyone, new employees and supervisory, were all subjected to harassment of some form or another.

By Mr. Devaney:

Q. Were lists of employees, to your knowledge, circulated? A. Yes, there were.

Q. What were these lists called?

316 The Court: Scab lists, I guess?

The Witness: This is the common name for them, yes, sir. And these were sent out, my particular knowledge particularly is right around St. Augustine and this would give—it even went to the extent of notifying their relatives what business their relatives were in. So apparently this could pass on to not doing business with their relatives. And of course, not only from—

Mr. Milledge: Excuse me.

This is going—this is not responsive to the question. He just asked him what the lists were called and since then—it is not responsive.

By Mr. Devaney:

Q. Mr. Thornton, as a result of this action, did you take any action with regard to the publication of the names of people then working for the Railroad? A. I beg your pardon?

Q. Did you take, as a result of this harassment and the circulation of the names of the people known to be working, did you take any action with regard to the publication or  
317 release by the Railroad of the names of people then working for Florida East Coast? A. Well, we attempted to protect these new employees to the fullest extent that we were able by not publicizing their names, so that they would not consequently be subjected to the harassment that was involved.

Q. Did this extend to the seniority lists that had previously been distributed? A. Yes, it did.

Q. Now, in your judgment, does this necessity for protecting the employees with regard to the identification of those who are presently working still exist, the necessity for it? A. Yes, it does. We are continuing to have sabotage even up to the present time.

The Court: Well, the lists don't have anything to do with sabotage.

The Witness: Well—

The Court: I mean, assuming that—

The Witness: I would assume—

318 The Court: —you give them the list, that doesn't have anything to do with sabotage?

The Witness: Yes, sir, it would to this extent. I would assume, if someone is willing to derail a train, they are also willing to cause harassment to these employees that are running the train. This is my thinking, Your Honor.

Mr. Devaney: No further questions, Your Honor.

#### Cross Examination

By Mr. Shapiro:

Q. Mr. Thornton, who is the head of the Transportation Department? A. The General Superintendent of the Transportation is Mr. Taylor.

Q. Do you supervise the Transportation Department? A. Yes, sir.

Q. Is this a specific supervision or is this a part of your general role as President of the Railroad? A. Well, I would say this: It's part of my general role but also I have a very specific responsibility toward the Transportation Department, as this was my responsibility before I became President, and I still assume these responsibilities in addition to the others I have.

319 Q. What does it mean to carry less than car-load lots on a permit basis? A. Well, if an individual wants to ship—well, let me start off—first, we embargoed the movement of LCL freight. If an individual wishes to handle a movement of LCL, he will call our General Superintendent of Transportation office and ask for a permit to do so and we will, if we are able to, and which we have in all recent instances, grant this permit. This is what it means.

Q. And when did you begin to issue the permits? A. I can't recall exactly. It was back in '63. As to the date, I could not recall.

The Court: I thought the testimony here, starting with these two Government suits in December and again with the Trainmen case about February, I guess, and this case in May, I thought it was all—today is the first time I remember hearing anything about LCL on a permit basis. I thought it was not handled.

The Witness: It's not. It has not been a large movement, Your Honor, but, just to give an example, the  
320 Government, for example, has asked us to move certain explosives.

The Court: Who?

The Witness: The Government has asked to move certain LCL shipments of explosives into the Cape. They have called us up to do this. This might be a shipment of 500 pounds or 800 pounds, the two that I recall. This would come under an LCL shipment. And we have granted a permit to do that, but we haven't as such removed the embargo against LCL freight.

The Court: Well, I understand what it is. They are offering and, if you want it, you do it is what it amounts to; the shipper—

The Witness: Yes, sir.

The Court: —they make special arrangements.

The Witness: Rather than if we want to, it's whether we can handle it. Our ability to handle it has been the governing question of whether we will or not.

321 By Mr. Shapiro:

Q. Do you recall this testimony in this proceeding last May, Mr. Thornton? I'm about to read from the transcript of May 26 and 27, at pages 291 and 292, and the examination is by Mr. Devaney, beginning at line 21:

“Q. Now, Mr. Thornton, you were asked, or the statement was made by the Court, that you weren't carrying LCL. This is less-than-carload freight?

“A. This is correct.”

Now, at that time, you were taking LCL on a permit basis? A. Well, on a permit basis, yes, sir. But our general embargo against LCL still continued. And the fact of actually handling it—in other words, the permit is based on the fact that they will load it and they will unload it at the point of destination, which has this effect: We are not physically handling it with any of our personnel, but it is the LCL rate because it receives the minimum rate you charge for a car-load shipment, for example. We have done this as an accommodation to the shippers and to the people that need this service; we have provided it.

Q. You testified that if you were required to  
322 adhere to the collective bargaining agreements, in the light of your inability to get the, I think it's 122 bulletined positions—that figure, of course, represents the corrections on Exhibit BB—that you would have a reduction of service of from 30 to 50%? A. I said this was difficult to estimate but, from a general picture, I would say it would be that and could ultimately mean complete cessation.

Q. That's 30 to 50% of what? A. Of the freight traffic that we are handling.

Q. At the present time? A. Yes, sir.

Q. Can you give us any indication of how much that traffic is in terms of pre-strike level at the same season? A. We are—in car-load lots, keeping it to that basis, we are handling now virtually the same car-loads per week that we were handling this corresponding week in 1962.

Q. I wonder if we could express that—do you recall a figure, a monthly figure, let's say? A. Well, we keep it on a week basis. The last weeks, the two weeks that I can recall, the immediate two past weeks, were in the 4800 category, 48 hundred and some or 48 odd, after that I don't  
recall the last two digits. This corresponds with 47—  
323 4600 cars for the corresponding weeks before the strike.



Q. You are not working any employees on a part-time basis, are you? A. I don't understand what you mean.

Q. Are they working a full day? A. Oh, yes. This is correct.

Q. Now, have you had much overtime in the last month, let's say? A. Well, yes, we have.

Q. Could you tell us—

The Court: You just changed from a six-day week to a five, on the 13th of November; didn't you?

The Witness: Yes, sir, this is correct. I was also—I'll qualify that: I was also thinking in terms of the operating crafts, which are not involved here; but we are, as far as the Transportation Department is concerned, we are also incurring overtime there but we are incurring overtime in the non-operating crafts, too.

Mr. Shapiro: I think that's all I have, Mr. Thornton.

#### 324 Further Cross Examination

By Mr. Milledge:

Q. Mr. Thornton, you told us that, back in the beginning of the strike, you notified Mr.—that is, that you made a decision that seniority rosters were not to be handed out because of harassment? A. I didn't want to have the names of our new employees made public.

Q. And did you notify Mr. Wyckoff of that? A. Yes.

Q. Will you explain then why it is that, in as late as June, 1964, Mr. Wyckoff still says the reason he won't hand them out is because they haven't even been prepared because of a lack of personnel? A. Well—

Q. Did he get the message from you? A. All I instructed Mr. Wyckoff to do was not to give the names out. Now, why he didn't, I suppose he testified to that himself.

Q. But in any event, you say that this idea or instruction is something that happened in the first couple of months of the strike? A. This is right. We immediately were involved in this situation. That's what caused me to

325 protect these individuals.

Q. Now, how many dispatchers do you have, scope dispatchers? A. We have four scope dispatchers.

Q. And how many—did you bulletin any more dispatcher's jobs? A. We did.

Q. How many? A. One additional dispatcher's job.

Q. And so I take it you've got one supervisor working a dispatcher's job? A. This is correct.

Q. All right. Now, I think, when you are telling us about the dreadful things that would happen if you had to apply the contract, you said that the whole Railroad could come to a stop if you didn't have a dispatcher? A. This is correct.

Q. Well, that's what you are using as your example? A. This is one of the examples. I wouldn't say this is the only one, but this is a very excellent example.

Q. Now, you could do the same thing and just work those four dispatchers a little overtime and cover the fifth job?

A. Not according to Federal law. Dispatchers, operators, can only work so many hours under the Federal hours of service law, and we would not be permitted under that law to work those men straight through.

Q. Well, let's go back to the beginning:

Suppose a dispatcher's job is for eight hours; correct? A. Yes, sir.

Q. And you've got—and what's your Federal Hours of Service law? A. Well, I can't quote it. I think it's nine hours continuous office and I— don't hold me to that, but I think that is correct.

Q. You say you couldn't comply with four dispatchers to cover five positions? A. I do not believe we could if they could only work nine hours.

Q. Well, do you—is this your department or isn't it? A. Again, I can't quote the law. If we could get the law, I could look at it and give it to you exactly but I can't quote that.

Q. Well, the most you need is one supervisor to handle one dispatcher's job? A. This is correct.

327 Q. Now, what is the size of your supervisory crew at the present time? A. You mean total?

Q. Total. A. When you say "supervisory", now you are including exempt secretaries and the like or just strictly supervisory people? For example, my secretary is an exempt employee but she is not necessarily a supervisor.

Q. Let's talk about supervisors in the sense that you have just talked about them so far, the people you would like to have do scope work. A. Well, I have no accurate figures to be able to tell. I would say somewhere probably in—to break it down, it would be a hundred supervisors who actually did supervision.

Q. And that's substantially more than you had before the strike? A. No, not particularly. We acquired some more to begin with but we, through attrition, have probably moved back to the position we were about the time of the strike.

Q. About the same number of supervisors at the time of the strike? A. I would say so, yes. It may be a little bit less.

328 The Court: Is this the total number of supervisory personnel, or is this the number doing scope work under these labor contracts?

The Witness: Well, this is—the number was the number of supervisory personnel that we have. Now, I don't think it will be that many that were actually performing scope work.

I didn't understand his question.

The Court: Well, the only thing I want to know is which ones we're talking about.

The Witness: The hundred I was referring to, Your Honor, were—

The Court: In all?

The Witness: —all men who were doing supervisory work.

The Court: You don't know how many of them are actually performing work that's covered by these labor contracts of these non-operating Unions?

The Witness: No, sir, I couldn't say definitely.

By Mr. Milledge:

329 Q. What's the name of the man who is doing the train dispatcher work? A. Mr. Dowling.

Q. Mr. Dowling? A. Yes.

Q. And how long has he been in your employment? A. Well, he was with us before I came with the Railroad in 1960. I don't know how long. He has been with the Railroad for many years.

Q. In that Department? A. Not in that—I think he had been in that Department before the strike began. He was made Assistant Trainmaster; that's his present title. And that was before the strike.

Q. And he works a regular eight-hour shift? A. This is correct.

Q. As a train dispatcher? A. Yes, sir.

Q. Now, in the Transportation Department, outside of the dispatcher situation, you say you have insufficient scope people? A. Yes, sir, this is correct, with the proper skills.

Q. You mean you have enough people but they don't  
330 have the right skills? A. Well, we haven't been able to get enough people with the proper skills to do all of the work according to the scope. That's why we bulletined these 26 jobs.

Q. Now, most of those 26, I take it, were clerk's work?

A. No, most of them were either accountants, cashiers, rate and division clerks. They were yardmasters, operators, handle train orders, dispatcher. These are all—

Q. In other words, this is a fairly uniform across-the-board thing? In other words, you have, if you had ten men in this category, you'd bid about four or five more, and so forth. A. I don't understand what you mean.

Q. Well, you didn't have—you have a lot of different types of personnel in your Transportation Department, but you have a lack of some of each; is that correct? A. This is right.

Q. It's not all in one—it's not just all clerks you are allowed? A. That's right. It's where we need that particular skill we lack and that occurs in most of the crafts.

Q. And you do have some of each skill? A. Well yes.

For example, the dispatcher, we have—

331 Q. Four out of five? A. We have four out of five.

Q. Now, you are presently working with about 80%, or 75 to 80%, of the scope personnel that you say you need, and you have about—you have 403 and you need 525. That's about 75 to 80%. A. Well—

Q. Is that about right? A. We have 403 and we need 122 additional, whatever that works out to be.

Q. Now, initially— A. I should say this: That some of the ones that we do have are not fully trained as of now; so those, we still would have to use the supervisory people to the extent until they are fully trained or—I want to make it clear on that.

Q. Well, that's— A. In other words, of the 403 that we have, not all of those are fully qualified to do the job that we anticipate that they will do and that we have still got to have a supervisory man with him to actually do the work and show him how it's done and whatever is necessary in the particular instance.

Q. But this situation of approximately 400 employees has been approximately a static work force since the 332 early part of 1964? A. Well, the gross number has been relatively static but the make-up of that has been in constant flux. We've had a tremendous turnover of people in that group.

Q. Well now, you started out in—when was it, Mr. Thornton, that you made the decision to start recruiting on a large-scale basis and attempt to fully man the Railroad?

A. This was in the Spring of '63 when we started to try to get other people to come in. Initially, we did it primarily with the supervisory people that we had there and, in the Spring, was when we began to recruit others.

Q. Well, could you give us the month, approximately, when you started in to that program? A. Generally, I would say about June. This is about the time that the college men got out of college for the Summer. This was the first area of people that we had to come in to work and, of course, this is an example of why it was such flux. These people were only with us for the Summer and went back, and of course this went into your quarterly or trimester situation here in Florida, which affected the turnover that we had of these employees.

Q. So about the first part of June is when you really started a recruitment program? A. I would say  
333 that's about right, from my recollection. It may have been, we may have been trying before that, but that was about the first time we got a volume to come in.

Q. All right. And you testified before the Defense Board in October that you had practically reached full manpower requirements; did you not? A. Well, we had enough to provide the service that was being required.

Q. So, when it was a question of getting the Railroad running, you were able in the matter of four or five months to build up a force from practically no scope employees up to your full requirements? A. Well, as I pointed out, this was a force capable of providing the service. We are providing the service today but we are doing so by having our supervisors do the work to a certain extent, to have to cross craft lines; and we are talking about two different things.

Q. We are? A. In other words, I was providing service to the public, and particularly at the Cape, I was providing service to NASA. And I told them that I had—we were approaching the point, I think was the words I used, of having a work force capable of providing service that they needed.

Q. But you maintained the number of personnel,  
 334 approximately the same, all during this year? In  
 other words, you haven't built it up to where you  
 will man it under the existing contracts? A. This is what  
 we have been trying to do.

For example, as Mr. Davidson testified earlier, we did a  
 great deal of this work with contract maintenance. And  
 as we were able to recruit our own force and work it  
 according to the agreement, then these contract forces were  
 eliminated.

Now, this is—our effort is trying to comply with the  
 agreement.

Q. Why is it then that your work force has remained  
 constant during this year? A. Well, for the one example  
 is—you mean in the Maintenance of Way Department or  
 over the whole—

Q. On the whole line, it has remained constant during  
 this year? A. Well, the thing is that we have been able,  
 early in our recruitment stage, to have the bulk—I'm talk-  
 ing about the labors, the unskilled, or with the minimum  
 skill—these came in. Our difficulty has been in these  
 skilled groups and this takes a greater period of time to  
 train them and the supervisory people that we have have  
 a capacity was to the amount of personnel that they  
 335 can train. So this is the reason for that.

Q. The real reason, Mr. Thornton, is the reason  
 that you have given in all of your public lectures and  
 written reports, is that you have manned this Railroad  
 under this working agreement, the November 24th agree-  
 ment, which has how been enjoined and have eliminated,  
 as you say, all of these undesirable practices. Up to now,  
 you have just manned your Railroad under that agreee-  
 ment? A. I don't—I don't—what is your question?

Q. The reason your work force has stayed constant at  
 400 during the last eight or nine or ten months, whatever  
 it is, is because you have been manning another agreement,  
 an agreement that's no longer in effect. Isn't that the



real reason? A. No. I don't quite understand your question.

The reason has been that the skilled crafts that we lack take time to train and we have had a turnover in this group, and I think, as one of the early exhibits showed, that we have hired a great many people during this time but, as a result of attrition, as a result of people leaving us, as a result of what reasons they may have, we have not been able to accumulate much over the 400. We still need more and we are attempting to get them, but we have not been successful in doing so. This is the deficit that  
336 we lack and, if we could make up this difference, we wouldn't have the problem.

Q. You have been training them now since almost a year and a half, since last June? A. Well, the point I was making is that you can train a laborer to drive a spike in a relatively short time, but you do not take a man and train him to be a rate and division clerk or a dispatcher or a yardmaster or an accountant in any comparable period. This is the people that we lack.

Q. Well now, for instance, in your Maintenance of Way Department, you've got all your—you're not lacking six bridge foremen; you are lacking six men, one bridge foreman, one assistant bridge foreman and five laborers; isn't that right?

The Court: Roadway—

The Witness: One roadway foreman.

The Court: Or one track foreman, whatever it is.

Mr. Milledge: Right. So one complete group?

The Court: Four laborers and two foremen.

337 Mr. Milledge: Yes, sir.

The Witness: Well, what happens there is the experience in the craft of the foremen.

In other words, what we propose to do is to establish two more gangs, a bridge gang and another roadway gang. Now, we've had enough laborers in some other gang that we could make up the balance of that force, but we haven't got

a supervisor or foreman that we can trust to go out and work on the track who has enough ability to know what to do and do it safely.

This is why we've got to have a supervisor with them to do it.

And the same situation exists in your Bridge Department. We can't, we do not have the foremen and, in that particular case, we do not have the bridgemen, which require a skill above that of a section laborer. And that's why that work is being contracted out.

By Mr. Milledge:

Q. What you actually have is, in across the board, you have about 80% in all you skills, whether it be in  
338 track laborers or whether it be foremen, you run approximately 80% in all skills? A. I couldn't say that necessarily; I mean, I couldn't—

Q. You have four out of five dispatchers. You have all but one gang. It isn't that your Maintenance of Way situation is bottom-heavy. It's uniformly depleted by one gang? A. No. Our problem is that it's bottom-heavy. We do not have the foremen trained and it takes time to train them. This is what we are saying.

Q. I suggest that's not what has been shown heretoday. You are lacking six men in your Maintenance of Way, but it's not six foremen you're lacking; you're lacking two foremen and four laborers. A. Well—

Q. It's a uniform loss. A. Well, I'm afraid you don't understand what I've said.

The foreman—in other words, we can get— Take the track foreman. We can get sufficient laborers to make a gang if we had the foreman.

Q. All right. A. So I could say we could bulletin more  
339 jobs as laborers, but we have laborers in some of these other gangs that we've been trying to train and we are a little bottom-heavy by having them there, but we need them there to train them but we haven't been able to train the foremen sufficiently.

Q. According to your testimony, you are only lacking two foremen in your Maintenance of Way Department? A. This is right.

Q. All right.

The Court: The testimony is you have one other bridge gang and you have eight other road gangs at this time.

The Witness: Yes, sir. See, the bridge work that we—the bridge gang that we bulletined, we have presently being performed by a contractor.

The Court: The foreman, and four men, is that about a proper size for a bridge gang, or is it one a little larger than that?

The Witness: It depends on the equipment they would have in their job. We try to break down—our plans are to have two bridge gangs, one for maintenance and  
340 one for heavy repairs. Now, your maintenance gang, a four man gang, is about right. To go into pile-driving, you may need a few more than that, where you are handling pile-drivers and cranes and the like.

By Mr. Milledge:

Q. Well now, back to your estimate of the consequences to the Railroad if you are obliged to operate under the contracts.

Back in May when your estimate was needed—you had about half enough employees in the non-ops crafts, the estimate was that if you had to operate, you would have a reduction of about 50% in your operations. But now the figures indicate that you've got approximately 75 to 80% of sufficient personnel without using supervisors, but you tell us this might close the Railroad down completely? A. It could, yes sir.

Q. Well, tell us how that could happen? A. Well, for example, go back to your dispatcher. If we couldn't operate trains because we didn't, we couldn't get a supervisor to do that work, it's certainly not safe to operate the train without any train orders or provisions to meet other trains. In fact—

341 Q. Well, you've got four out of five of them. A. Well, what are you going to do for the other eight hours of day?

Q. Well, explain that. A. In other words, five—it takes five dispatchers to work the regular tricks.

Q. All right. A. So, during 40 hours a week, you couldn't run a train. This is what I'm saying.

Q. All right.

Assuming that it does take five dispatchers to operate a railroad, is there any other example in which the lack of a man is going to stop the whole system? A. Well, I think it would have the ultimate result. Take, for example, your mechanical department. We've got to have car inspectors. Now, this is a man that's got to be able to inspect the car and determine if that car is safe down—safe to operate down the Railroad. Now, this is a skill.

Now, I can't take an unskilled man and have him go out and look at that car and have him, for the safety of that train crew, for the safety of the public involved,—

Q. How many car inspectors do you have? A. I couldn't precisely say but these were some of the positions  
342 that were advertised, I recall from Mr. Hales' testimony here, for car inspectors.

Q. Well, car inspector is simply mechanical; I mean, it's mechanical training, right? A. Well, he has got to have the experience in being able to detect a flaw. This is a skill and it takes experience and it takes time.

Q. Well, are you saying that your car inspectors are primarily supervisors now? A. We certainly have to have our supervisors do some of this work and to go with the trains that are on the job; and this is the way we are attempting to train them, is on-the-job training, and at the same time we've got to see that the job is done safely. Certainly we cannot operate a train, in fact it would be against the law to operate a train, without it being properly inspected.

Q. And you say no trains are inspected without a supervisor being there? A. I don't know if no trains are inspected. I know most all of the trains are being inspected with the supervisor being present. Now, I couldn't make the statement that no trains are being inspected, but we have some returnees. We have probably some that are approaching the point where they will be able to do  
 343 it, but we are still lacking in this craft very specifically.

Q. But you don't have any figure? A. Not the number, no, sir. If I remember correctly, however, I think it's in the record what Mr. Hales testified to.

Q. Did he testify on the car inspectors? A. I'm pretty sure he did. I think he went through—now I'm mistaken. It was Mr. Wyckoff who went through each bulletin but I recall Mr. Hales testifying that he did have to have car inspectors and they were part of those who were bulletined.

Another area was in your Signal Department. We have the maintainers but, in many areas, they do not have the sufficient skills to maintain some of the signal appliances. To tune in your relays at your crossing protection and your code on your CTC; now, this takes a special skill and these people, in many instances, have not these skills and it's necessary that the supervisor do this. And again, these are requirements of the Federal law insofar as your signal appliances are concerned and insofar as your car and safety appliance act is concerned.

Q. And do you recall your signal man Webb testified you haven't added a single man in that Department since  
 344 April? A. I think the testimony is that the people that he advertised, some seven jobs, this was for the construction of CTC.

Now, we have most of the maintainers that we are going to have, but they are not sufficiently trained to do this work without the supervisors assisting them and showing them how to do some of it.

Q. I think you have—in other words, you say you've got enough people to do the thing but they are just not trained? A. In some cases, this is right.

For example, the eleven maintainers, we did not advertise any maintainers that I recall. We have sufficient signal maintainers but they aren't sufficiently trained.

Now, we do not have sufficient signalmen and foremen for the signal gang to install CTC. You recall that was Mr. Hales' testimony—Mr. Webb's testimony.

Q. You mean all these seven jobs are just all CTC jobs? A. Well, I think that some of them that also were involved in the signal shop but, other than the signal shop, the CTC construction, that was the purpose for them.

Q. But you say that you are actually trying to increase the size of your work force but just haven't been  
345 able to increase the size of it this year? A. Well, we have bulletined 122 jobs. Now, we need to increase it to that extent.

Now, I will admit also, as this evidence shows, that we are—

Q. Well, excuse me. Did your ideas change then on November 5th, or whatever it was, when you bulletined these new jobs? A. I don't understand the question.

Q. In other words, did your purpose, your man-power requirements change on that date? A. No, but we had as many men—well, not as many.

Q. Well— A. We had about as many men as we could train.

Now, we couldn't bring in 114 unskilled people and train them at this time. We haven't got the capability of doing this. Now, if we had 114 or 122 skilled people come in, then we could do it. But we are talking about an entirely different thing of bringing unskilled and a skilled man in.

Q. Well, you brought 400 in, or more, in a six-months' period. Now, you say you can't bring 100 more in now?

A. Well, these were men that needed very little training.

These were the unskilled or small skilled employees.

346 I think I've already testified to that effect.

Q. Now, that isn't the way it sounds from the testimony.

The testimony sounds like you've got the same ratio of foremen to the total number of foremen as you do have laborers to the total number of laborers, as illustrated by—as by the Signal Department. A. I don't follow you at all on that.

Q. Well, of course this actually does come down to one question. It does come down to a question of money; that you could take your crews that you presently have and work them on overtime, time and a half, and get these various jobs done, and work under the contracts? A. I don't follow what you mean.

Q. Well, you've got—just as a for instance, in your Motive Power Department, you've got 136. And you say you need 199. Well, you've got 141 now. You just work some of those men time and a half and pay them time and a half? A. Well, they don't—

Q. And get the job done? A. —have the skills to do the work.

Q. They have the skills to do it eight hours a day, 347 don't they? A. No. That's what we've been pointing out to you. They don't have the skills in many instances to do this, and this is why we have to have supervisory people assist them in that, because they don't have the skills.

Q. So it wouldn't do any good to work them time and a half then? I mean, overtime? A. If they can't do the work without supervision being there, the supervision has still got to be there to do it.

Q. Well, are the supervisors doing the work or are these 136 men doing the work? A. A little of both. Now, we've got supervisors having to do some of this work, just like I explained with the dispatcher. He's working a full



trick because we don't have anyone else to do it that's capable and trained to do it.

Now, in most cases, we've got a supervisor working with the man and training him to do it. And he's also having to supervise the general operation. But there are instances where our supervisors are having to do the work.

Q. Well, there are instances—I mean—you mean like Mr. Wyckoff's clerk in his office and like the one dispatcher, are those the instances you are talking about? A. Yes, they are—

Q. In other words, there are a few specific instances where you have got to have a supervisor actually working in a scope position because of critical importance? A. Yes, full time. But now, there are many instances where the supervisor has got to work with a man along with the work and actually do some of the work in showing him how it's done.

Take, for example, your car inspection.

The Court: Your what, Mr. Thornton?

The Witness: Car inspection.

We've got the General Foreman going with the car inspector to inspect the train. Well now, to a large extent, that car, the General Foreman is making the inspection of the car because he knows what to look for. And if he sees something, he know what he sees. At the same time, he can point out to his car inspector that, "This is a defect. This is what might cause a wreck. This would have to be cut out. The brakes aren't properly adjusted, or air brakes out of date." This is the way he instructs the man. But at the same time, he is in effect doing the work.

By Mr. Milledge:

349 Q. So— A. And this is many examples.

Q. Most of your staff, you say, are still untrained and can't work by themselves; now, is that the gist of it? A. There are a great many of them, yes.

I think Mr. Hales' testimony was that out of the 136, 52 of them were—

Q. Apprentices? A. —apprentices. So this is very indicative of this situation.

Q. So that would indicate— A. It's better than a third of his force who are apprentices. And even the journeymen are not, in many specific skills, are not able to do it.

Q. All right. I had sort of misread a lot of your correspondence, a lot of your writings, in which you told about what a fine staff you had and it was much better than the former employees. And I take it your testimony is that that's not true, that they are people that require—

A. I think the talk—you are talking of some talks I made or articles; the point I was making in these was that the featherbedding of the railroad industry is tremendous, that we were able to do with the force that we had, supervisory force and those that we were training, a much more efficient job in some instances than we were doing  
350 prior to the strike. Now, this—

The Court: These labor contracts—

The Witness: That's right. And this is the point I was trying to make, is that the labor contracts are featherbeds. This is the point I was making. I didn't want to mislead you at all on that.

By Mr. Milledge

Q. All right, that's where we are back to.

What you want to do is use supervisors, just like you have been using them, right on, so that you can violate the contracts ad infinitum. A. No, that's not correct.

Q. That's where we are back to, isn't it? A. No, that's not correct at all. That was your statement, not mine.

Mr. Milledge: That's all I have.

The Court: Mr. Devaney?

Mr. Devaney: Your Honor, I have no redirect on this, except the one point that we have not yet covered,  
351 and this was bridge tending.

The Court: This was what?

Mr. Devaney: The bridge tending.

The Court: Yes, sir.

Mr. Devaney: That was Point No. 6 in the Application. Mr. Shapiro had indicated this morning that he agreed that there was no objection to continuing to perform this.

Mr. Milledge said that he didn't agree as to Item No. 6, although he did as to Item No. 3.

I have deferred it until this time and, if Mr. Milledge wishes to reserve his objection, I would like at this time to develop this point by technically recalling Mr. Thornton with respect to this one item that has not been dealt with yet.

The Court: You haven't changed your view since yesterday, have you?

Mr. Milledge: I still don't understand what the problem is.

352 The Court: All right, you may go ahead and proceed.

#### Further Direct Examination

By Mr. Devaney:

Q. Mr. Thornton, will you tell us what bridge tending involves? A. Well, this involves the operation of draw bridges, raising them and lowering them, greasing them, for the passage of—the greasing is a part of the maintenance element, which is done in some instances. However, to a large extent, this is done by bridge forces but the actual bridge tending is done by—is actually raising and lowering the bridge to permit boats to pass.

Q. And prior to the strike, who actually performed this work of lowering the bridge or opening the span? A. This was performed by a group called the bridge tenders, which comes under the Maintenance of Way agreement.

Q. Now, what was the situation after the strike began? A. Well, this was performed by supervisory personnel.

Q. Now, did this continue to be performed by supervisory personnel? A. Well, we have supplemented that

in some instances by security personnel. Now, I  
 353 speak of this—there are companies that provide  
 guards for this, any industrial security, and we have  
 called on these people to help with the security of these  
 locations.

Q. Now, do the supervisors, Mr. Thornton, as well as  
 these security guards, perform the function of a guard in  
 addition to their normal bridge tending duties? A. This  
 is correct.

Q. And why has this been necessary? A. Well, the  
 bridges, the draw bridges as well as other specific bridges,  
 are critical points that would cause us considerable dam-  
 age, in fact, put the Railroad out of operation, if they  
 were mishandled or if they were sabotaged, and we have—  
 in fact, much of the sabotage has been directed toward  
 bridges, dynamiting bridges, and so forth, or tampering  
 with the track on bridges. And for this reason, it has been  
 necessary that we use either supervisory people or bonded  
 security guards for this work.

Q. Do I understand that the job they are now perform-  
 ing is not entirely the same as what was required of these  
 bridge tenders before the strike? A. No. Their primary  
 duty is that of security.

Mr. Devaney: No further questions, Your Honor.

354 Mr. Shaprio: I believe the Government has waived  
 objection in this area.

#### Further Cross Examination

My Mr. Milledge:

Q. Why can't you have bridge tenders, like you are sup-  
 posed to have under the contract? You can hire people to  
 tend a bridge, can't you? A. Because they are so critical.  
 This is the kind of thing that you can't make but one mis-  
 take on and, for this reason, we cannot afford to use any-  
 one other than supervisory personnel or a security guard.

Q. No, I'm not asking you about the man who holds  
 the gun or walk around, whatever security you want to

have, high rails or whatever security you want. I'm sure you want to have that by supervisory. But there is a job called opening and closing the bridge, which is a job under the contract. Why can't those people be hired? A. Well, for example, some of the people that have come in and attempted to hire out with us have been people who have been trying to do so to come in and sabotage the Railroad.

Now, we have to guard against this very specifically. And this would be an area where these people would try to do that and we couldn't afford to take the chance  
355 because—

Q. That would be the same thing for engineers. I mean, these engineers have been on strike and anyone of them could tear your equipment all to pieces at any time, if he had a criminal intent. Isn't that right? A. This is the reason we have to be so extremely careful. But when you come into an area of a draw bridge, for example the draw bridge right here at Jacksonville, if it is out of operation, we can't get a car on the Railroad, the Railroad is completely isolated. And it's for this reason it is of such paramount importance that we cannot afford for the security of the Railroad, for the continued operation of the Railroad, to permit someone that we haven't full security or bonded security guard or a supervisory person to perform.

Q. Now, I'm not talking about the security aspect of the bridge. I'm just talking about the man who opens and closes it. A. That's what I'm talking about also.

The Court: You have your supervisors do that, as I understand it, either a supervisor or a bonded guard?

The Witness: Yes, sir.

356 The Court: Actually operate the mechanism; is that what you are saying?

The Witness: What we are saying, Your Honor, is that—

The Court: You do away with the regular bridge tender and have a bridge, kind of a combination guard and detective and bridge tender?

The Witness: Well, it happens that way; but the point I was making was that we cannot permit the future of the Railroad to be placed in the hands of a man that might drop the birdge too hard and say, "Well, I'm sorry, I just made a mistake." But you broke the bridge. And this puts us out of business.

I think this is the matter that is of such major importance that we cannot afford to let anyone handle the bridge, raise it or lower it, that could accidentally or any other way put it out of operation.

The Court: If you find a qualified person, that's no greater, no more cirtical or less critical than this other position.

357 The Witness: If I could be absolutely sure, sir, that he wasn't going to, after he became qualified, so to speak, then mishandle the bridge and put us out of business.

For example, Your Honor, in the Federal case involving the sabotage on this Railroad, it was brought out by the witness in that case that what they suggested was for the man to come in and hire out on the FEC and then do sabotage within the Railroad itself. And this, we've got to guard against at all times. And this is an area that is particularly subject to this type of interior sabotage that we cannot permit.

By Mr. Milledge:

Q. You couldn't have a bridge tender in addition to the guard? I mean, you think you need to have a guard there? A. Well—

Q. With a gun and whatever else he has? All these people are armed, I take it? A. I assume they have it available; if they don't—

Q. I mean, he could guard the bridge tender too, couldn't he? A. But if the bridge tender drops the bridge too fast and he could very innocently say, "I'm sorry, I made a mistake"; but that's not going to prevent the Railroad

358 from being out of operation. And under the strike conditions that we've been operating under, under the known conditions that we have people trying to hire out who are doing so to sabotage the Railroad, I think that we would be reasonably expected to place the future of the Railroad operations under those circumstances.

Q. You've never had any interior sabotage during this whole strike, have you? Have you had any person that you hired that caused some damage from the inside? A. With the exception that the four men were convicted, we don't know who performed the sabotage. We do know that four men were convicted. They were all Union members but—in fact, one of them was a Union Officer.

Q. You don't have that problem now; you're not hiring Union people? A. Yes, we are. They are coming back to work, but I'm not—that's not the problem that we are faced with here.

Q. Well— A. We are talking about hiring anybody.

Q. If you have such a problem, the same problem is a uniform problem that, if your shops are destroyed, somebody goes in there and blows up your shops, you can't operate? A. It's a matter of relative—you can blow up a shop, this doesn't shut the Railroad down, but if you mishandle a draw bridge—we're talking about a period

359 of—

Q. You repair the draw bridge? A. Not in a period, in any reasonable period. We had to build a bridge to the Cape, for example. That took us about a year. We had to order the steel, the steel had to be rolled; in fact, we—

Q. So if a bridge tender drops a bridge too hard, that's going to take you a year to replace the bridge? A. It could. This is the situation that we are faced with and this is why we—

Q. But the reason—let's just get back—the reason you don't want bridge tenders out there and manned under the contract is because he might push the lever too hard?



You can't reasonably be afraid that the bridge tender is going to blow up his own bridge because you're going to have a security guard next to him? A. Well—

The Court: Because he is on it, too, I guess.

Mr. Milledge: Of course, that's another reason.

The Witness: He can do the same damage by just dropping the bridge too hard and bending it. This is very—  
 this is exactly what I'm talking about and, as you  
 360 may know or may not know, we have security guards  
 on both ends of the bridge. It isn't a matter of cost.  
 We are spending over a thousand dollars a day to provide  
 security to prevent sabotage. Now, this is extra cost that  
 we are put to on account of strike conditions that we aren't  
 talking about—we could be eliminating this cost; eliminate  
 the sabotage and the vandalism, the savings to us would be  
 tremendous, but we can't afford to do that. It's not a matter  
 of cost to us at all. It's a matter of security.

By Mr. Milledge:

Q. And you say that the only reason you say that you don't want to have bridge tenders is because they will let it down too hard? A. This, we are afraid of and we cannot take that chance.

The Court: Are you through?

Mr. Devaney: I'm through, Your Honor; we have no further questions of the witness.

The Court: Do you have any further—

361 Mr. Milledge: No, sir, of this witness; I think we ought to go into that other question.

The Court: I didn't hear you.

Mr. Milledge: I didn't mean to say we did not have some other testimony.

The Court: Oh, no. I mean with the witness.

You may come down, Mr. Thornton.

(Witness excused)

362 Mr. Devaney: That's all we have at this point.  
 We rest, Your Honor.

The Court: This is all the evidence you present?

Mr. Devaney: That's correct.

The Court: It may be a good time to break off for a few minutes, before you Gentlemen start.

Will you have evidence?

Mr. Shapiro: I would like to recall Mr. Wyckoff for a few questions, Your Honor. I cannot say that it is—

Mr. Milledge: I don't think ours—

The Court: All right. We'll take that. Then you—in other words, that will be all that the United States would have and you would be prepared to go ahead with yours right away?

Mr. Milledge: Yes, sir.

363 The Court: All right. Suppose we break now.

(Short recess)

The Court: You may proceed.

Mr. Shapiro: Call Mr. Wyckoff.

**Raymond W. Wyckoff,**

having previously been sworn as a witness on behalf of the Defendant, was recalled as a witness on behalf of the Government and testified as follows:

Direct Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, you understand you are still under oath?

A. Yes, I do.

Q. Mr. Wyckoff, you have testified that the Railroad is in full compliance with the collective bargaining agreements, except in the respects listed in the Application which the Court is now considering, and you have also testified that you are appointing people to journeyman positions from the apprentice classes; is that right? A. That's correct.

Q. Now, are your apprentices indentured apprentices under the collective bargaining agreement for the

364 shop crafts? A. I don't follow your meaning. Are you referring to Rule 31 of the agreement?

Q. I believe that is the Rule. Perhaps we ought to bring out of the record the agreement for the shop crafts. Now, I think it is contained in Exhibit 4, which was introduced last May, and it is somewhere in this envelope. I don't recognize it on sight; do you think you could? A. I have a copy of the agreement here.

Q. Shall we use that? A. It's all right with me.

Q. On the understanding that I believe this is already in evidence, from the previous proceeding.

The Court: It's already in evidence. There is no question about that, is there?

By Mr. Shapiro:

Q. I'm afraid you'll have to share your copy, Mr. Wyckoff. A. (Witness tendering instrument to Mr. Shapiro) It's Rule 31, I believe.

Q. Now, what are the requirements of Rule 31? You needn't read it. A. It simply says:

365 "All apprentices must be indentured and shall be furnished with a duplicate of indenture by the Railway."

That's a matter that's handled by the Mechanical Department and always has been. I assume it's being done.

Q. Is there some particular form of indenture? A. I believe it's a printed form. There again, as I say, it has been handled by the Mechanical Department over the past years.

Q. Is this form of indenture on page 38 of the agreement the form which would be used? A. It's a form here. As I say, I think it has been printed off, the printed form which is used by the Mechanical Department.

Q. But that is the form that's contained in the agreement and would necessarily be the form you would have to use under the agreement? A. That's right.

Q. And all your apprentices now have these Articles of Indenture? A. As I say, that's a matter handled by the Mechanical Department. I assume they have.

Q. But you don't know? A. That's correct.

366 The Court: Has Mr. Hales gone?

The Witness: Yes, he has.

By Mr. Shapiro:

Q. Now, you testified this morning that apprentices would be assigned to journeymen positions and given their seniority and pay, and so on, when they became eligible under the agreement; is that right? A. I believe I said they were slotted into the appropriate standing as apprentices, based on their prior experience in outside industries in that particular trade, and then given a credit—

The Court: And didn't you also say that when they were promoted to journeymen that they got the appropriate pay raise and went on the seniority roster?

The Witness: That's true, Your Honor, yes.

The Court: I thought you said that.

By Mr. Shapiro:

Q. Now, if an apprentice has to be indentured, how can you credit his outside service? A. By determining what his prior service was.

367 Q. Under the agreement, what is it that permits you to refer to his outside service? A. I don't think there's anything in the agreement that prohibits you from referring to his outside service. Unless the agreement restricts you in some way, the management has the prerogative of doing it.

Q. Now, is there any provision in your agreement for temporary employees? A. No, no provision for temporary employees that I know of.

Q. Would it help you to re-examine page 87 and page 88 of the agreement? A. Well, that's a Memorandum Agree-

ment covering non-qualified employees. That was negotiated during World War II.

Q. Is it still in effect? A. Yes, it is.

Q. And what does it provide? A. Well, it simply provides that the Railway will continue their efforts to secure qualified men of four years railroad experience, as required by the Rules. And of course, we're doing that. We're trying to get railroad men with four years experience. We haven't been successful.

368 Q. If you can't get men with the— A. It says:

"In the event needed personnel cannot be recruited as outlined above, the following shall govern:

"(a) That necessary personnel will be recruited by the Supervisors in charge and local committees of the respective crafts."

Now, I don't know of any that have been recruited for us by the committees.

Q. I understand; go on.

A. "In such recruiting, during the present emergency and by Agreement between the Supervisors in charge and the Local Committees, men may be employed even though their qualifications may not be in strict accordance with the qualification rules of the respective crafts, as covered by the current agreement; it being understood that each application of such non-qualified person will be subject  
369 to acceptance by Supervisors in charge and Local Committee in each case."

Shall I continue reading?

Q. Please.

A. "When employees enter the service under paragraph (b), they shall be considered Temporary Employees, serving only until such time as the present emergency is over,

or until such time as duly qualified men with four years railroad experience make application for employment.

"When duly qualified men having four years railroad experience make application for employment in the respective crafts or seniority sub-divisions thereof, sufficient temporary employees will be released to make room for them. Temporary employees released under these conditions will be given not less than three (3) working days' notice before release becomes effective. When it becomes necessary to release temporary employees as provided for in paragraph (d), the Local Committee and Supervisor in charge shall consider all temporary employees in the craft affected and shall agree on which temporary employees are to be released (taking into consideration previous experience and ability to do the work). If the Local Committee and Supervisor in charge cannot agree, the matter shall be referred to the Superintendent Motive Power and Machinery and the General Chairman of the craft affected to make decision. In the event they fail to agree, employees will be released in reverse of order in which they were hired."

Q. Well, in the light, in view of the fact that the contract restricts the assignment of apprentices to journeymen positions and instead would require the appointment of temporary employees during the non-strike period, you state that the Railroad nevertheless has the right to appoint apprentices to journeymen positions, based on its own judgment as to their prior experience? A. I say yes; that agreement entails certain considerations on the part of the organizations. The organizations have not discharged those considerations, so the failure on their part to discharge their considerations certainly releases the management from that particular Rule.

Q. Does the—are the present rates of pay in force the same as those that are paid by other railroads in the South-eastern territory? A. They are not.

Q. Is this in accordance with Rule 46 of the Shop Craft Agreement? A. I believe it is.

Q. Could you read Rule 46 of the Shop Craft Agreement? A. It says:

"The Railway will, in the future, maintain rates of pay equal to those generally paid in the Southern Territory."

Now, I think our rates of pay are in excess of those in the Southeastern Territory, considering employees in all occupations.

In other words, this doesn't—this isn't confined strictly to railroad employees. It is rates of pay in the Southeastern Territory. Now—

372 Q. Just the Southeastern part of the United States? A. That's right.

Q. An average prevailing wage? A. That's right, in comparable positions.

Mr. Shapiro: I have nothing further of this witness.

Mr. Milledge: I have no questions. I'm going to call him as my own witness.

The Court: Well, is this the only witness the Government wants to call?

Mr. Shapiro: This is the only witness.

The Court: Before Mr. Milledge calls him, do you want to—

Mr. Devaney: I have no questions, Your Honor.

The Court: All right.

We may consider then that Mr. Shapiro has rested for the United States.

373 Mr. Shapiro: Yes, Your Honor.

The Court: And that Mr. Milledge is starting his case off by calling, by re-calling Mr. Wyckoff.

Mr. Milledge: As the Managing Agent of an adverse party under the Rule.

The Court: Yes, sir.



**Raymond W. Wyckoff.**

having previously been sworn, was recalled by the Interveners as a Managing Agent of an adverse party and further testified as follows:

**Direct Examination**

By Mr. Milledge:

Q. Mr. Wyckoff, what information is on a seniority roster? A. Well, it depends on which craft you are speaking of. The majority of them have just the man's name and his Social Security number, listed in seniority order, date order.

The Court: The name and the date he went to work?

The Witness: And the—

374 The Court: Sometimes his Social Security number?

The Witness: —Social Security number.

By Mr. Milledge:

Q. It doesn't have a man's address on there? A. No.

Q. Or any other information, other than his name and possibly his Social Security number, and date? A. And some are divided up by work locations.

Q. According to seniority districts? A. That's right. Some seniorities are confined to points, for example, so you can tell where the man was located by the seniority roster.

Q. Do you presently have seniority rosters made up for the non-ops crafts? A. Within the last few weeks, I have made such rosters, yes.

Q. You do now presently have them? A. I have such rosters prepared, yes; I don't have them with me, if that's your question.

Q. The first ones that have been prepared since the— since January of '63, are these ones you have just  
375 recently prepared? A. That's correct.

Q. And you have assigned each man to a particular craft? A. I don't quite follow your question.

The seniority roster doesn't assign them to a particular craft. He establishes seniority in the craft he enters service, for example.

Q. All right. But anyway, you have now made these things up? A. That's correct.

Q. All right. You hadn't made them up back—well, you have already answered that.

Now, you were a part, were you not, of the negotiating team for the Florida East Coast involved in the wage dispute out of which this strike arose? A. Yes, I was.

Q. All right. And data was prepared of the costs to the Railroad of granting the 10.28 increase? A. Yes, it was.

Q. Could you give us an approximation of that cost, either on a monthly or a yearly basis, weekly, or whatever?

A. It has been quite a while ago now that those negotiations took place but, as I recall at the time, based on 376 the employees in the service at that time, we anticipated the additional cost would be \$331,000 a year.

Q. A year? And was Mr. Thornton approximately correct just a moment ago when he said that the cost of security to the Railroad at the present time, I mean, that is special security as a result of—that you have added since the strike, of approximately a thousand dollars a week? A. I don't think he said a thousand dollars a week.

The Court: He said a thousand a day, didn't he?

Mr. Milledge: A thousand a day?

The Court: Is that what he said?

The Witness: As I recall it, yes.

By Mr. Milledge:

Q. Is that approximately right? A. Since Mr. Thornton is in charge of that, I would say that it's correct. I have no way of knowing.

Q. Oh, all right. So apparently the amount for security exceeds the cost of the wage increase? A. Based on those figures, yes.

Q. All right. Now, you sent out a letter, Mr. Wyckoff, a letter that Judge Simpson referred to earlier, to several of the crafts dealing with passenger car—I mean, passenger business; did you not? Saying that they were all cut off, or saying that they lost their seniority rights? A. Well, let me answer it this way—

Q. All right. A. Certain of the agreements have provisions in them for the forfeiture of seniority. Included in those—

Q. But you sent out some letters along that line? A. It wasn't strictly for passenger employees, is what I'm getting at. I understood that to be your question.

Q. Well, to which organizations or which individuals in which organizations did you send these? A. As I recall, there were Train Porters, there were Redcaps, there were Coach Attendants and Train Maids, and there were Train Dispatchers.

Q. Train dispatchers? A. That's right.

Q. Outside of the Dispatchers, the other deal— well, you sent out one to the Dining Car Attendants, too, did you not? A. I said Coach Attendants; we don't have Dining Car Attendants.

Q. All right, Coach Attendants. Outside of Dispatchers, those were all dealing with passenger— those are people who dealt exclusively with passenger business, did they not? A. No. Train Porters, for example, handle baggage, handle mail.

Q. Well, you are not carrying any? A. We want to, but unfortunately the Government hasn't given us contracts to carry the mail.

The Court: You're not carrying any baggage either, are you?

The Witness: No, sir. We are not handling any passengers.

The Court: If you are not carrying passengers, you are not carrying baggage.

The Witness: That's correct.

By Mr. Milledge:

Q. So you sent out this letter. Now, was the letter based on your impression that the Injunction that His Honor entered, that this Court entered this month, required these letters to be sent out? A. No. It was based on my  
379 impression of the meaning of the agreement.

Q. Well— A. The agreement—

Q. I just wanted to make— if you will just answer the question first and then make your explanation.

You didn't interpret this Injunction to require you to cut off, to terminate the seniority rights of these people? A. No, the—

Q. Or purport to? A. The Injunction required that we comply with the agreement to the fullest extent possible.

Q. All right. So we know, you didn't feel that you had to send these letters out? In other words— A. To comply with the agreement, yes.

Q. All right. Now, assuming that His Honor clarifies this Injunction on Motion, I take it then that you will withdraw these letters; is that correct? A. Well, I understood I was to comply with the agreements in their entirety.

Now, there are specific provisions in the agreement for this.

Q. Well, assuming there is a clarification, you will withdraw the letters? That's what I want to know?

380 A. If His Honor directs me to withdraw the letters, I suppose I'll have to.

The Court: This is a kind of an unexpected windfall, it seems to me.

The Witness: Sir?

The Court: I say, as far as you're concerned, this is kind of an unexpected windfall, to notify these people that they were cut off?

The Witness: I don't consider—

The Court: It wasn't the result that you had first anticipated by being under the Injunction.

The Witness: Well, I don't consider it a windfall, Your Honor. As I say, I was simply trying to comply with the agreements.

By Mr. Milledge:

Q. Would you be just as happy to keep these people on your seniority rosters? A. That wouldn't constitute  
381 compliance with the agreement.

Q. So it's just a matter of getting the Injunction straight to—I mean, we could clear this thing up with a slight modification of the Injunction, to your satisfaction and to these people?

The Court: "Tis not so nominated in the bond."

The Witness: Excuse me, sir?

The Court: "Tis not so nominated in the bond." Merchant of Venice.

If he has to comply with the agreements, he's going to comply with them.

By Mr. Milledge:

Q. You—in other words, you take it as a matter of interpretation of these agreements that, even though you haven't operated the passenger service, you have the right to cut these people off and terminate their seniority after a year? A. Well, as I read the agreement provisions, there is no exception.

Q. In other words, if they didn't work for a year, for whatever reason, even though you weren't running any work, running any operation upon which  
382 they could perform work, that you are obligated to cut them off? A. That's the way the agreements have always been applied in the past.

The Engineers' agreement used to contain a comparable provision, because of—

Q. Have you ever had—you have never had a situation in which you had no job available for any man on the seniority roster for a year, have you?

The Court: Prior.

The Witness: In the history of this railroad? Yes.

By Mr. Milledge:

Q. You have? A. Yes. As I recall from reading the files, the Locomotive Firemen were on strike, back in the '25's—that strike was never settled. The shop crafts went on strike in the '20's. That strike was never settled.

Q. Well, that—so you never got around to this problem of what the interpretation of the agreement was then? A. I don't say that those particular agreements had a comparable provision in them.

Q. Oh, well.

383 Mr. Milledge: That's all I have.

The Court: Any questions?

Mr. Devaney: I have nothing further.

The Court: All right, come down.

(Witness excused)

Mr. Milledge: Mr. Cooke, please.

**R. M. Cooke,**

having been produced and first duly sworn as a witness on behalf of the Intervenors, testified as follows:

Direct Examination

By Mr. Milledge:

Q. Would you state your name, please. A. R. M. Cooke.

Q. And where do you live, Mr. Cooke? A. At New Smyrna Beach, 1202 Live Oak Street.

Q. And do you have an official capacity with a labor organization? A. Yes. I am General Chairman of the Brotherhood of Railway Carmen of America, and  
384 President of System Federation 69.

Q. Does System Federation 69 have a collective bargaining agreement with the Florida East Coast? A. Yes, it does.

Q. Is there a provision in that agreement permitting the management of the Florida East Coast to grant equivalency—well, let's strike that.

What are the qualifications to be a journeyman under System Federation 69? A. Four years experience at the classification that you are making application for.

Q. Is that—And that's four years experience as an apprentice? A. Either four years experience as an apprentice or four years experience as a mechanic in some other railroad industry.

Q. All right. Is there any provision for waiving that—waiving any part of this by the management for experience in non-railroad work? A. There is a special agreement that was signed, I think originally, in 1942 that provides that mechanics can be employed with less than four years experience at the trade, provided it is by agreement between the Local Management and the Local Shop Committee.

385 Q. Outside of that, is there any provision for the management unilaterally granting journeymen rights or mechanics rights to someone— A. No, there are none that I know of.

Q. —with less than four years experience, railroad experience? A. There is also a supplement allowing them to advance apprentices under certain specified conditions;

First, those with three years experience, and then again, those with two years experience.

I don't think that it goes beyond that. I'm not aware that it does.

The Court: Is that supplement a part of this Exhibit 4 at the May hearing?

Mr. Milledge: Sir?

The Court: Are all these—is that supplement he's talking about a part of it—

Mr. Milledge: Yes, sir.

The Court: —in this brown envelope over here?

386

Mr. Milledge: Yes, it is.



The Court: Is that correct? I'm not making a statement; I'm asking a question.

Mr. Milledge: We certainly intended that that be the case, back in May. I think we had all supplements to all contracts. And there is in this System Federation 69 agreement a limitation on the number of apprentices that may be hired at any one time?

The Witness: Yes, there is.

By Mr. Milledge:

Q. And that is on the basis of a ratio? A. A ratio of one apprentice to each five mechanics in the craft that he is joining.

Q. All right. In addition to that, there is an age requirement, and so forth, of apprentices? A. Correct. 17 to age 22.

The Court: 17 to what, Mr. Cooke?

The Witness: To the age of 22, Your Honor.

387 By Mr. Milledge:

Q. Now, we spoke a minute ago about Rule 43, the one that deals with—do you have your contract or copy of the contract? A. No, I don't. I have it back there.

The Court: Do you want to go back and pick it up.

By Mr. Milledge:

Q. Why don't you get it. A. All right, sir. (Proceeding to table and obtaining instrument and returning to witness stand)

Q. Rule 46 has to do with this? A. Rule 46(a).

Q. Rule 46 has to do with rates of pay? A. That's correct. It is titled, "Fixing Rates of Pay".

Q. And what provision does it make for rates of pay? A. Paragraph (a) says:

"The Railway will, in the future, maintain rates of pay equal to those generally paid in the Southeastern Territory."

Q. Prior to the strike, did this Railroad pay the same rates of pay paid by the Southeastern railroads?

388 A. Yes, they did.

Mr. Devaney: Your Honor, I object to this.

We are here on the basis of complying with the contract. This contract contemplates wage rates in it and I think that any attempt by Mr. Milledge to convince the Court that we are obliged to pay a different wage rate because of some other provision that he is referring to requiring wage rates to be not less than those in the Southeastern Territory is entirely improper.

The Court: It's in the contract, the contract here, the one that you say you are complying with.

Mr. Devaney: That is right, Your Honor, but it's perfectly obvious it's a question of contract interpretation and it has no point in being before this Court. If there is a dispute about it—

The Court: If it's a question of interpretation, the interpretation placed on it by the parties having the claims has some bearing; doesn't it?

389 Mr. Devaney: I don't believe that it does, Your Honor, for the simple reason that they are referring to a provision which, in prior years, this Railroad was a part of the negotiations by the Southeastern Carriers Conference Committee. For this reason, to go back to what existed immediately prior to this strike has no application whatever. This Railroad was not party to the national handling that involved the entire non-operating unions' dispute in 1960. It has not been party to any national handling of any dispute since that time.

The Court: That is not what's involved here. What's involved here is this contract.

Mr. Milledge: That's right.

Mr. Devaney: That's correct, Your Honor, but it's a perfectly obvious situation that there is a difference of interpretation. It involves the construing and applying of the contract.

The Court: I heard Mr. Wyckoff's interpretation without any objection from you or anybody else.

390 Mr. Devaney: Well, those were not questions that I asked, Your Honor. We went into it to a degree. But I am merely saying that I think this is a matter of contract interpretation, that it does not belong before this Court; that if there are claims that the Union has, that the Railway Labor Act provides a forum for the determination of any dispute involving the interpretation and application of an agreement.

What we are required to do under the Order of this Court is to comply with the agreement. Now, where we disagree as to the meaning of the contract itself, this is a matter for the Adjustment Board.

The Court: The objection is overruled.

You may proceed.

By Mr. Milledge:

Q. And did this Railroad, prior to this time, pay rates not less than those paid by the other railroads in the Southeastern United States? A. Yes, they did.

Q. Is that the meaning of Southeastern Territory, 391 in your contract? A. In my way of thinking, yes.

Q. Well, the rates have always been the same, have they not? A. That is correct.

Q. Have they ever been—did the Southeastern Territory have any—are there any statistics published by the Department of Labor, or something like that, that you have ever heard of that set a rate for all persons in the Southeastern United States? A. No, not that I'm aware of, no.

Q. Now—

The Court: Well, let me get something clear about this: Car inspectors, they inspect and bad order cars, they go and look for the violation of the Safety Appliance Act?

The Witness: Yes, sir.

The Court: And bad order a car and it has to go out of service or the Railroad is violating the law?

The Witness: Yes, sir.

392 The Court: Industry in general, as far as you know, does it have any car inspectors? I mean, in other than the railroad industry?

The Witness: No, sir, only in the railroad industry, as far as I know.

The Court: All right, sir.

By Mr. Milledge:

Q. You received a number—

The Court: That would be, as opposed to something perhaps like a sheet metal worker who might work in a number of other industries, it would seem to me a car inspector is confined to the railroad industry; I don't know.

Go ahead, Mr. Milledge.

By Mr. Milledge:

Q. In any event, by past practice, this Railroad has paid all crafts in System Federation 69—as a matter of fact, the same as the other Southeastern railroads? A. Generally, yes; on one occasion, we managed to secure an adjustment on the Helpers' rate of pay on the Florida

393 East Coast based on what the ACL was paying under this Rule. It was only two cents but an adjustment was made on it.

Q. So that you actually obtained an increase based on that? A. Obtained an increase—I did not; now, this was handled under the terms of the previous General Chairman, but an increase was obtained which amounted to two cents per hour for the helpers on this property, based on what was paid by the Atlantic Coast Line.

Q. Now, Mr. Cooke, in the "Conditions of Employment", that document was handed out before to everyone on the Railroad and also the "Uniform Working Agreement" which was the September 24th Notice, both of those provided for an eight-hour day or an eight-and-a-half-hour day with thirty minute lunch period.

Your are sufficiently familiar—A. I think that's right, yes. That's correct.

Q. Now, what does your contract provide in regard to the length of a working day?

Mr. Devaney: Your Honor, I object.

The testimony already shows that we are in compliance with the provisions of the contract with regard to—

394 Mr. Milledge: I think that's in dispute and I will—

Mr. Devaney: What's in dispute here?

The Court: Is it in dispute?

Mr. Milledge: It certainly is, Your Honor. That's why it takes a few questions to get to it. I will show, Your Honor, the bids. They are still bidding, bulleting them, on an 8½ hour day, not on an 8 hour day.

They tell Your Honor they are in compliance but there's some doubt about that.

The Court: Well, certainly you have a right to go ahead and make a showing. I just didn't realize—

Mr. Milledge: Yes.

The Court: —there was any dispute about this matter. Go ahead.

Mr. Milledge: Well, we can wait and bring it up on a contempt basis, but I think it's better to maybe let  
395 it come out right now.

The Witness: Well, that is contained in Rule 2 of this agreement, if you would like me to read it. May I read it?

By Mr. Milledge:

Q. I think it would be helpful. A. Rule 2 is entitled, "Shifts":

"(a) There may be one, two, or three shifts employed. The starting time of any shift shall be arranged by agreement between the Local Officers and the Employees' Committee, based on actual service requirements.

"(b) The time and length of the lunch period shall be subject to agreement, preferably within the limits of the

fifth hour, except where three shifts are employed, when the lunch period shall be twenty minutes without loss of time."

Q. Now, you have received bids, have you not? A. I have received bulletins and bids.

Q. Do the bulletins—what is the length of the day?  
396 A. Well, of the bulletins that have been issued at New Smyrna Beach in my department—

The Court: You are speaking of these, November 2nd, from November 2nd forward bulletins?

The Witness: Yes, sir.

Mr. Milledge: Yes, sir.

The Court: New bulletins?

Mr. Milledge: New bulletins.

The Court: Since the October 30 Order?

Mr. Milledge: Yes, sir.

The Court: All right.

By Mr. Milledge:

Q. The new bulletins? A. On all of the bulletins I've received on the positions at New Smyrna Beach, the starting times have been changed to one hour later than  
397 they were at the time of the strike or prior to the strike.

The lunch periods have been changed to thirty minutes, in addition to the eight-hour shift, in other words. My shift there was from 7:00 to 3:00. Now, it's from 8:00 to 4:30.

Q. With 30 minutes for lunch? A. That's right.

Q. Prior, you were working from 7:00 to 3:00? A. Right.

Q. With a 20-minute lunch hour? A. Yes, sir, right.

Mr. Milledge: That's all I have.

The Court: The Plaintiff didn't put any actual bulletins in, did they? Mr. Devaney didn't introduce any actual bulletins?

Mr. Milledge: No, perhaps it would be well if we—

The Court: I think you might consider identifying one and putting it in this record.

You're talking about what's in a written document.

398 If you have one, it's better to have it in the record.

Mr. Milledge: Almost all the ones I have, Your Honor, have some writing on them but—

The Court: If you can erase it, or I can overlook the writing and just—

Mr. Milledge: Do you have one that doesn't have writing on it?

The Witness: There is a New Smyrna bulletin, pre-strike. (Producing) Let's see if I have—

By Mr. Milledge:

Q. Have you got one that isn't marked? A. Yes. (Producing instrument) There is the prestrike bulletin. There is a recent one. (Producing)

Q. Now, Mr. Cooke, you've handed me two bulletins. One is dated April 13, 1963; that is a pre-strike bulletin pertaining to carmen. Is that a carmen's job? A. Right.

Q. At New Smyrna? A. Right.

Q. And—

399 Mr. Devaney: What is that date, Mr. Milledge?  
Mr. Milledge: April 13, 1962.

By Mr. Milledge:

Q. And then you have handed me another one, which is November 27, 1964, and the second one is one that also pertains to a carman's job, doesn't it? A. Right.

Q. At New Smyrna? A. That's correct.

Q. Now, the one on April 13, 1962 shows what time for work? A. This is a double bulletin. Actually, it is an award of one position and an advertisement of another one. Both positions are first shift, 7:00 a.m. to 3:00 p.m.

Q. And under the contract, how much time for lunch?  
A. 20 minutes for lunch, preferably during the fifth hour.

Q. And that's 20 minutes out of the 8 hours? A. That's right.

Q. Now, the bulletin of November 27, 1964, has something to say about the time of work? A. It is a first shift



400 position advertised 8:00 o'clock a.m. to 4:30 p.m.,  
less 30 minutes meal period.

Mr. Milledge: We offer these two as Intervenors'—

The Clerk: No, 1, I guess.

The Court: Did the Intervenors have any numbers  
earlier?

The Clerk: Not that I can see by the transcript. I would  
have to get the file. It doesn't show.

The Court: We should start him off where he left off,  
just like we did the Defendant. It isn't that important;  
put it No. 1. Start with No. 1 for this hearing, at this  
hearing.

(Thereupon, Intervenors' Exhibit No. 1 was received and  
filed in evidence.)

Mr. Milledge: That's all the questions I have of this  
witness.

The Court: Cross-examine.

#### Cross Examination

By Mr. Devaney:

401 Q. Mr. Cooke, this bulletin which has been intro-  
duced as Intervenors' Exhibit 1, for 1962, how many  
shifts were being operated in New Smyrna Beach  
at that time? A. There were three shifts being operated.

Q. And the provisions of your agreement provide that  
the lunch period shall be 20 minutes when there are three  
shifts; isn't that correct? A. That's correct.

Q. And how much time was allowed in 1962, where there  
were only two shifts? A. I was trying to think of a point  
where we had two shifts; I don't know.

Q. You don't recall whether— A. Well, the Locomotive  
Department in New Smyrna had only two shifts and they  
took the same lunch period that we did.

Q. You are saying that they took 20 minutes? A. That's  
correct.

Q. You are certain it wasn't 30 minutes? A. In the Locomotive Department at New Smyrna?

Q. Well— A. Definitely 20 minutes.

Q. Where they had only two shifts? A. Definitely, they worked the same shift we did.

Q. Now, what—I don't quite understand your complaint, Mr. Cooke, as to how we are not in compliance. Is this because you have not agreed to the new starting time? Is that the— A. I have no complaint. I—

Q. Well, the argument is that we are not in compliance with the present bulletin, because the starting time is different.

Now, is this because you have not agreed to the new starting time? Is that your contention? A. I would have had nothing to do with agreeing with the starting time, Mr. Devaney. It would have been handled by the Local Shop Committee and the Local Management. I'm not a part of either one.

Q. Is it because the Local Shop Chairman or Committeemen did not agree with the new starting time? A. That would be the violation there, yes.

Q. That's your alleged violation? A. Yes.

Q. Now, prior to the strike, Mr. Cooke, weren't there proposed changes in hours at New Smyrna Beach? A. Not at New Smyrna Beach, that I'm aware of.

Q. Weren't there proposed changes that were discussed with you, Mr. Cooke? A. At Miami, but not at New Smyrna Beach.

403 Did you agree to them at Miami? A. No, I did not agree to them.

Q. Now, since the strike, your people have respected the picket lines; isn't that correct? A. My people are on strike.

Q. And haven't you also written to the effect that you have instructed your members not to return to work? A. That's correct.

Q. Now, under these conditions, how could you have agreed on the starting time, or how could the Local Chairman have agreed on the starting time for people that you were refusing to permit to work? A. Well, it would have been a little bit hard, I'm sure.

Mr. Milledge: Excuse me. All this—Mr. Cooke didn't ask to set up these things and that's not it. The problem is over the fact that they are working them 8 hours instead of 7 hours and 40 minutes.

Mr. Devaney: Now, Your Honor, that is what I wanted to develop with Mr. Cooke, and I would like again for Mr. Cooke or Mr. Milledge, either one, to point to the  
404 provision of this agreement that has any such provision in it.

The Court: Well—

Mr. Devaney: Now, he has made this statement twice. He has referred to a provision that is not applicable, unless there is a three-shift operation.

The Court: Excuse me. I think it would be perfectly proper for you and Mr. Milledge to argue it out when you get through. I don't consider it proper for you to argue it out with the witness at this time.

If there is an objection to the question, I sustain the objection.

Mr. Devaney: Now, Mr. Cooke—

The Court: You'll have to make your argument to me and not to the witness. He is simply called as a witness. He is produced to produce some papers here and he is not the one making the argument. It's his counsel.

By Mr. Devaney:

Q. Now, Mr. Cooke, under Rule No. 2, the only provision here for the payment for the lunch period is  
405 when there is a three-shift operation; isn't that correct?

Mr. Milledge: Now, Your Honor, I think this is the same thing.

He has pointed out the Rule. I'll make the argument. He has asked him what was the practice. He testified about it.

The Court: Objection sustained.

By Mr. Devaney:

Q. What was the practice prior to the strike, Mr. Cooke, for the payment for the lunch period for people who were not on a three-shift operation? A. Well, as I've explained, at New Smyrna, we had—for instance, the rip track worked only one shift and that was where I was employed. And we had only one shift on the rip track and we took 20 minutes off for lunch, with pay. We worked from 7:00 a.m. to 3:00 p.m. There was no second shift or no third shift.

Q. Now, as I read Rule No. 2, the provision says that:

"The time and length of the lunch period shall be subject to agreement—"

A. That is my understanding.

406 Q. "The time and length of the lunch period shall be subject to agreement, preferably within the limits of the fifth hour, except where three shifts are employed, when the lunch period shall be 20 minutes without loss of time."

A. That's the way I understand it.

Q. The limitation here and the practice was that you got 20 minutes with pay when you had three shifts.

Now, do you have any documents or records—

Mr. Milledge: Excuse me.

He just testified that that wasn't their practice. Evidently Mr. Devaney just put some words in his mouth.

The Court: I don't—I'm not sure I understand, Mr. Milledge.

Mr. Milledge: Well, I'm not sure what Mr. Cooke said but I think he said yes to some long question, which would

be exactly contrary to what he just finished testifying; so it must have been some misunderstanding.

407 The Court: Continue. That's all right, go ahead.

By Mr. Devaney:

Q. Now, is your familiarity limited to New Smyrna Beach, Mr. Cooke? A. No, it is not.

Q. Now, where, other than New Smyrna Beach, were there operations where there was only one shift? A. At no other point that I'm aware of.

Q. You are saying that, to your knowledge, people who worked on a single-shift operation were paid for the lunch period prior to the strike? A. I was myself. I was in that position myself.

Q. At New Smyrna? A. At New Smyrna Beach on the repair track. We had only one shift.

Q. And you are saying that you were paid and that you got a 20 minute lunch period? A. Yes, sir, I did.

Q. Now, other than Rule No. 2, Mr. Cooke, are there any other provisions that relate—of this agreement that relate to the lunch period? A. I don't recall at the time that there is.

Q. Well, I mean, you have it. Is there any other  
408 provision that relates to the lunch period? A. To the lunch period? Also, Rule 3, "Pay for Lunch Period". Well, that has only to do with lunch periods on the overtime basis though.

I don't recall at the time, Mr. Devaney, of any other Rule.

Q. Is there any other Rule, Mr. Cooke, that relates to the number of hours in the work day, other than Rule No 2? A. The number of hours, yes. Rule No. 1 is "Hours of Service" Rule.

Q. What does that provide, Mr. Cooke? A. Would you like me to read it?

Q. Yes, I would. A. "An eight (8) hour period shall, under provisions hereinafter set out, be the regular work

day. A forty (40) hour week shall, under provisions hereinafter set out, be the regular work week. Regular work day and work week hours shall be bulletined. All employees coming under the provisions of this agreement, except as otherwise provided in this Schedule of Rules, or as may hereafter be legally established between the 409 Carrier and the Employees, shall be paid on the hourly basis.

"Establishment of shorter work week.

"NOTE:—"

Q. This is quite long. Let me ask you this:

Would you go over those provisions, Mr. Cooke, and tell me whether any of them relate to whether or not the lunch period is to be part of the time paid for? A. (Examining agreement) No, sir, none that I see in that Rule, unless I overlooked it.

Q. Is there any other Rule, to your knowledge, that would relate to the hours of service and the payment or non-payment of the lunch period, other than Rule 2, as we have already looked at; and you have referred to Rule 3 for overtime? A. No, that's the only one that I know of.

Q. Now, Mr. Cooke, on the question of Rule No. 46:

Did you negotiate that Rule? A. No, sir.

Q. So when you are talking about the intent, you had no personal knowledge of what was intended by the Rule in the course of the negotiations; is that correct? A. I have all the records of the previous General Chairman and that is what I am basing the statement that I 410 made earlier about the helpers' pay being adjusted at one time on the basis of this Rule. It was from the records that I have of his.

Q. But you know nothing about the negotiations, because you were not present? A. No, sir. I was not present.

Q. Now, isn't it correct, Mr. Cooke, that you personally submitted a dispute some time ago involving the same assertion that you are now making that Florida East Coast should have paid a higher rate than it was paying?

A. As I recall, I did it some time in June of 1962, yes.

Q. And isn't it true, Mr. Cooke, that that matter was not resolved in your favor or else was dropped and not resolved at all? A. Well, it was not resolved at all. I let it die under the 60-day provisions of the August 21, 1954 agreement. I just did not progress it.

Q. Now, did I understand your reference to the advancement of the apprentices to mean that, under the supplement to the agreement, apprentices who had had only two years training could be advanced to a journeyman status if they possessed the sufficient qualifications to be  
411 advanced to that position? A. I think that's about the third step provided in that memorandum, apprentices.

Q. Is that part of this agreement? A. Yes, sir, it's in the back.

It is the memorandum of understanding between the Florida East Coast Railway Company and the Federated Shop Crafts.

Q. May I ask the page? A. Well, it's page 84 actually; I didn't realize it was numbered, dated March 4, 1942.

Q. Fine, thank you.

Now, there is nothing in this, as I read it, Mr. Cooke, that relates to where a man begins the apprenticeship training or, that is, at what step of the apprenticeship training he commences his training? A. No. I think that part of the apprentice training is contained in Rule 32.

Q. That would be the one appearing on page 38; is that correct? A. Yes, sir, that's correct.

Q. Now, are you saying that under this, Mr. Cooke, that it was not permissible to take a person with experience as a machinist, for example, in another industry and put him at some level of the apprenticeship training  
412 program, rather than the first rung of that program?

A. We have never credited anything except railroad experience to any applicant throughout the years that I've been involved.

Q. Except that the supplement that you referred to, on



page 84, clearly permits the advancement of apprentices after two years of railroad experience; is that correct?

A. That's correct.

Q. Now, I didn't quite understand your testimony about the provision for waiving. What did the waiver relate to?

A. The waiver on what? I don't understand.

Q. Well, it was asked in connection with your apprenticeship program and you indicated that there was a provision for waiving by special agreement.

Now, was this—did you intend this to be limited to the advancement under the memorandum that appears on page 84? A. Yes, under this March 4, 1942 memorandum. That's what I had reference to.

Q. Now, going back again, Mr. Cooke, to the Intervenor's Exhibit 1, do I understand you to be saying that the change in the shift of hours from 7:00 a.m. to 8:00 a.m.

is without objection? You don't—you are not saying that that is a violation of the agreement? Or are you saying it's a violation of the agreement?

A. I would say that it is a violation of the agreement.

Q. All right. Now, why are you saying that it is a violation of the agreement? A. Because the starting times and the lunch periods were changed without any—

Q. Let's forget lunch period just a minute. A. All right. The starting time—

Q. Now, the starting time? A. The starting time and the quitting time were changed without any consultation with the Local Committee.

Q. Now, during the period that you are on strike, you also stated that it would have been a bit difficult to have agreed on a change in hours for people that you have encouraged not to work at all; isn't that correct? A. I don't recall saying it just like you put it.

Q. Well, you are on strike; isn't that correct? A. Yes, sir, that is correct.

Q. You are not actually in a position that you are willing to agree on any such matter; isn't that a reasonable state-

ment? A. That's reasonable, yes, sir. I don't think  
 414 I would have agreed to the change had I been a  
 member of the Committee.

Q. Now, on the lunch hour, we have covered that.

You contend that the lunch hour—and, incidentally, how  
 many shifts are now being worked at New Smyrna? A. I  
 have have no knowledge of that; I couldn't say.

Q. Well now, are you asserting that this is a violation  
 on the belief that three shifts are being worked, or that  
 less than three shifts are being worked? A. No, sir. I'm  
 saying that it's a violation on the assertion that the Local  
 Committee was not consulted on the change of shifts.

Q. All right. Now, on the lunch itself, are you saying  
 that this is a violation because the lunch is not paid for and  
 three shifts are being worked? Or is it your contention  
 that the meal period must be paid for, regardless of how  
 many shifts are worked? A. I merely said it was a viola-  
 tion because the shift was changed, deleting the 20-minute  
 lunch period with pay and instead instituting a 30-minute  
 lunch period without pay.

Q. Well now, it is clear, is it not, Mr. Cooke, from your  
 testimony that in 1962 three shifts were being worked at  
 New Smyrna Beach on all but a few that you have  
 415 made reference to, on the rip track and a few other  
 locations where only one shift, I believe you testified,  
 was being worked and in others perhaps only two shifts?  
 A. At New Smyrna Beach, there were three shifts em-  
 ployed in the train yard. Those were the car inspectors  
 and car oilers.

The repair track, where I worked, had only one shift—  
 7:00 a.m. to 3:00 p.m.

The locomotive shop had two shifts, from 7:00 a.m. to  
 3:00 p.m. and from 3:00 p.m. to 11:00 p.m. I'm aware of  
 that because I worked over there occasionally as engine  
 house carpenter.

Q. All right. Now, are you saying that everybody at  
 New Smyrna, whether they were on one, two, or three-

shift operation, got this same 20 minute lunch period and that it was paid for by the Company? A. You are speaking of New Smyrna?

Q. New Smyrna, that's correct. A. Yes, sir.

Q. Whether it was one, two or three shifts? A. Yes, sir.

Q. And it is your contention now, that because the lunch period isn't being paid for, that that's a violation;  
416 is that correct? A. It is a part of the violation. The change shift is the main violation.

Q. You consider the change in the shift the main violation? A. Yes, sir.

Q. Yet you just testified you wouldn't have agreed to the change if you had been asked? A. I doubt that I would have.

Q. Now, you also have stated that there was no other provision, insofar as you are aware, other than Rule 2 which relates to the lunch period? A. Well, that's correct; none that I'm aware of.

Q. This is the one that you are basing your contention that there is a violation with respect to the lunch period, is Rule 2; is that correct? A. That's correct.

Q. Now, in the apprenticeship provisions, Mr. Cooke, either Rule 32 or the other agreements relating to it, is there any provision which limits the Company from placing individuals with outside exeperience in higher levels of the apprenticeship program? A. Nothing other than past practice. We have never credited outside experience, not  
417 even a painter which you would naturally think might fall into the right category. It had to be railroad painting, for instance, to qualify as a four-year painter.

Q. Now, did I also understand, Mr. Cooke, that your knowledge of this adjustment that you referred to with respect to the helpers was based on information that you got from files, not on personal knowledge? A. From the former General Chairman's records and from records of the Second Division Railroad Adjustment Board.

Q. Was there a decision in that matter, Mr. Cooke?  
 A. I believe—I'm not positive of that, Mr. Devaney, whether it was carried all the way to the Board or whether it was settled on the property. I know that the final settlement signed with Mr. Hunt allowed two cents per hour. I'm aware of that because I went that far into it.

Q. The agreement was signed with whom? A. With Mr. R. B. Hunt.

Q. R. B. Hunt. And who was Mr. R. B. Hunt? A. He was—they've changed the title to the position so much, I'm not sure; I think it was Superintendent of Motive Power and Machinery for Florida East Coast.

Q. Do you recall or have any knowledge, Mr. Cooke, of what shifts were operated at New Smyrna Beach from the time the Railroad began the resumption of its operations, on and after February 3rd of 1963? A. No, sir. I'm not aware of it.

Q. You do not know whether the shift differed in 1963, or at any time in 1964, from the time it had originally started in 1962? A. No, sir. The first news that I had that it had been changed was when I received these bulletins recently. I had no knowledge of what they were working prior to that.

Q. These aren't the first bulletins you have received, are they, Mr. Cooke, since the strike began? A. I have received about three or four previously from Bowden, but these are the first bulletins I've ever received from New Smyrna Beach.

Q. Well, what was the situation at Bowden? Did you detect any change there? A. There have been no changes that I see in the Bowden bulletins.

Mr. Milledge: Excuse me.

Your Honor, it would be irrelevant anyway. They haven't operated under these contracts, the labor contracts, until, they say, November 13th of this year. It's entirely irrelevant what shifts they worked under some other agreement.

419 Mr. Devaney: Your Honor, I think the established starting time, if it has been changed over a period of time, is part of the consideration here. It doesn't—

The Court: Well, he has been on strike and he hasn't been bulletined and I don't know how he can help you any.

Mr. Devaney: Well, I think he just testified that he has received bulletins from Bowden, although he has not received any involving—

The Court: I heard him.

Mr. Devaney: —New Smyrna.

By Mr. Devaney:

Q. Now, at Bowden, Mr. Cooke, what is the situation there on the payment of the meal period?

Mr. Milledge: Excuse me, I object on the basis it's irrelevant what other violations of the contract the Railroad has been engaged in when admittedly not working under these contracts.

420 The Court: I can't see that it has anything to do with it, but go on and answer.

The Witness: As I recall from the bulletins that I have received recently, it is still on the same basis that it was before, 20 minutes off for lunch with pay.

By Mr. Devaney:

Q. Now, how many shifts are being operated at Bowden; do you know?

The Court: He doesn't know.

The Witness: No, sir, I don't.

By Mr. Devaney:

Q. I mean, at the present time?

The Court: He isn't working for the Railroad.

Mr. Devaney: Well, he has had opportunities, I'm sure, Your Honor, to find certain information. They maintain pickets, for example, at the entrances to Bowden yard.

I'm certain he knows whether they are working one, two or three shifts.

421 The Court: He says he doesn't and I agree with him; there is no reason to know.

By Mr. Devaney:

Q. Did I understand correctly, Mr. Cooke, that you hold a position not only in the Carmen's Union but in System Federation 69? A. Yes, sir, that's right.

Q. And if I recall correctly, System Federation 69 includes other than shop craft unions? A. The other five, yes, sir, besides my own.

Q. Now, other than your own Union of the Carmen, are you asserting that there is any violation with respect to starting time or the meal period as to any of the people making up System Federation 69? Other than the Carmen? A. No, sir. I have only received Carmen bulletins. I'm not aware of how the positions are being bulletined for the other crafts.

Q. You have not in any event been advised by any of the constituent members. And you are the President of System Federation 69? A. I have had one bulletin handed me by the Boilermakers' Local Chairmen at New Smyrna Beach and, honestly, I haven't even looked at it. I  
422 have it with me if you want me to bring it out.

Q. But you have not been advised by any of your constituent labor organizations that there is any violation of their agreements? Well, it would be the same agreement, wouldn't it, Mr. Cooke? A. Yes, sir, it's the same agreement.

Q. Now, have any of those organizations told you or represented to you that the starting time or lunch period was being violated? A. Since arrival here in Jacksonville, Mr. McDougall of the Machinists, General Chairman of the Machinists, tells me that his are at New Smyrna just like mine, being violated.

Q. This would be the same Rule? A. Yes, sir.

Q. The same agreement; is that correct? A. Yes, sir.

Q. The only one, this is the only agreeemnt that we are talking about for all the shop crafts? A. Well, understand there are other agreements that go with this, supplements. This is the basic Federated agreement though.

Q. But all of them, all shop crafts and all that make up System Federation 69, are signatories to this agreement? A. No, sir. The Firemen and Oilers are not. They have a separate one, which looks about like this. It's a little brown book.

Q. But they are members of System Federation 69? A. Yes, sir, they are, but they are not covered under this one.

Q. They have a separate one? A. Yes, sir, that's right.

Q. All right. Other than Mr. McDougall, who else has told you? A. Mr. DuPont of the Electrical Workers. Those are the only two that I've talked to.

Q. Mr. Cooke, would you refer again to Rule 2? A. Yes, sir.

Q. Under Rule 2, Mr. Cooke, would it have been permissible to request an eight-hour-and-thirty-minute shift with no payment for lunch where you were operating less than three shifts? A. Yes, sir.

Q. To do it by agreement? A. It would have.

Q. And it wouldn't have been in violation of Rule 2? A. What made it in violation was the fact that the Local Committee was not asked or consulted.

424 Q. So it is the fact of consultation that you really are saying is the violation? A. Yes, sir.

Mr. Devaney: No further questions.

The Court: A unilateral change is what he is saying.

#### Redirect Examination

By Mr. Milledge:

Q. An unilateral change makes the men work 30 minutes more than they did without the unilateral change? A. That's correct.



Mr. Milledge: That's all.

Mr. Shapiro: No questions.

(Witness excused)

Mr. Milledge: That's all the Intervenors have, Your Honor.

The Court: He said Mr. McDougall of the Boilermakers and Mr. DuPont of the—

Mr. Milledge: He is an electrician.

425 The Court: —of the Electricians; since he has been here in Jacksonville had.

One other thing—oh, yes, he lives in New Smyrna at 1202 Live Oak. I didn't think he had given that.

Mr. Devaney: I'm sorry. Was that all the Intervenors had, Your Honor?

The Court: He announced closed.

Do you have any further testimony?

Mr. Devaney: Yes. I would like to recall Mr. Wyckoff.

The Court: Would you gentlemen just as soon argue this thing in the morning, after this witness? This will be the only witness, won't he?

Mr. Devaney: That's all, Your Honor.

The Court: Are any of you pressed to bet back somewhere?

Mr. Devaney: No, Your Honor.

426 The Court: Can we go on? How about you, Mr. Shapiro?

Mr. Shapiro: I have no official reason to be back in Washington.

The Court: Well, it's half-past 5:00 and, rather than keep myself and these gentlemen here any later, I think I'll take it in the morning. And you might be able to give me, aside from some rebuttal from Mr. Wyckoff, that's all that you will have?

Mr. Devaney: Yes, Your Honor.

The Court: So you gentlemen might be preparing your, whatever argument you want to advance with that in

mind, and we will take the argument and get through, I think, at an early hour in the morning.

9:30, please, Mr. Marshal.

Mr. Milledge: Your Honor, I know that you have announced adjournment but, just so that we wouldn't have to hold our people for whatever rebuttal, is this rebuttal only going to go to this testimony of Mr. Cooke?

427 Mr. Devaney: Yes, sir.

Mr. Milledge: Is that what it is?

The Court: Then I think everybody can go, then.

Thereupon at 5:30 o'clock p.m., on Tuesday, December 1, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m., on Wednesday, December 2, 1964.

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428 At 9:30 o'clock a.m., on Wednesday, December 3, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had:

The Court: Good morning, Gentlemen.

Counsel: Good morning, Judge.

Mr. Devaney: Mr. Wyckoff.

#### **Raymond W. Wyckoff**

having previously been sworn, was recalled by the Defendant in rebuttal and further testified as follows:

Mr. Devaney: Would you mark this for identification?

The Clerk: KK.

(The referenced material was marked Defendant's Identification Exhibit KK.)

#### **Direct Examination**

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you this document, which has been marked for identification as Defendant's Exhibit KK.

Would you tell us what this document consists of?  
 429 A. It's a series of bulletins advertising jobs in the shop crafts in 1961, through and including January 3rd, 1963.

Q. Are these bulletins all in regard to a particular location? A. Yes, these are jobs located at the Miller Shops, outside of St. Augustine.

Mr. Shapiro: What shops?

The Witness: Miller.

The Court: Miller, at St. Augustine.

By Mr. Devaney:

Q. Now, prior to the strike, Mr. Wyckoff, how many places were there that operated on a three-shift basis, insofar as the shop crafts were concerned? A. Well, we had three shifts working at Bowden, at New Smyrna Beach and Hialeah.

Q. And what were you working at Miller Shops? A. One shift.

Q. And these bulletins represent the hours worked in the shop crafts at Miller Shops; is that correct? A. That's correct.

430 Mr. Devaney: I move that Defendant's Exhibit KK be received in evidence.

Mr. Milledge: If I might just ask a single question on voir dire?

The Court: Surely.

Voir Dire Examination

By Mr. Milledge:

Q. Is Miller Shops still in operation? A. Yes, it is.

Q. At the present time? A. Yes, it is.

Mr. Milledge: We have no objection.

Mr. Shapiro: The Government has no objection.

The Court: Mark KK in evidence.

(Thereupon, Defendant's Identification Exhibit KK was received and filed in evidence.)

## Further Direct Examination

By Mr. Devaney:

431 Q. Mr. Wyckoff, I hand you again Defendant's Exhibit KK.

Will you examine those bulletins and tell me what was done with respect to the allowance of a meal period at Miller Shops? A. Well, a 30-minute period within which to eat was set forth, and that 30 minutes was not included in the working hours.

Q. Does that mean that it was not paid for? A. That is correct.

The Court: What hours do they run down there? 7:00 to 3:30?

The Witness: 7:00 to 12:00 and 12:30 to 3:30.

The Court: 7:00 to 12:00 and 12:30 to 3:30.

By Mr. Devaney:

Q. At the present time, Mr. Wyckoff, where are three shifts in force on the Florida East Coast, insofar as the shop patterns are concerned? A. At Hialeah.

The Court: Hialeah only?

432 The Witness: Yes, sir.

By Mr. Devaney:

Q. Now, can you tell me, Mr. Wyckoff, what is being done at Hialeah with respect to the payment of the lunch period? A. 20 minutes within which to eat has been included in the hours of payment.

Q. And you are not then operating three shifts at New Smyrna? A. No, we are not operating three shifts at any other point, other than Hialeah.

Q. Now, Mr. Wyckoff, do you have—

The Court: Well, excuse me. Bowden is on two shifts?

The Witness: Yes, sir.

The Court: And New Smyrna Beach is on two shifts?

The Witness: It's on one.

The Court: New Smyrna on one; Bowden on two.  
 433 Mr. Devaney: Do you have the agreement? I've forgotten the number of it, the brown book?

The Clerk: They never did get the original out of there. They were using—

Mr. Milledge: We were using copies. Mr. Wyckoff has one.

Mr. Devaney: Oh, you have one there? All right.

Mr. Shapiro: May I make a suggestion, Mr. Devaney?

Mr. Devaney: Yes, you may.

Mr. Shapiro: I think that the extracts from that big envelope should be called 4-A, B, C, and so forth.

Mr. Milledge: That's already in as 4-C.

Mr. Shapiro: Oh, that's already in as 4-C?

Mr. Devaney: That's already in as 4-C.

By Mr. Devaney:

Q. Now, you have a copy of the agreement, have  
 434 you, Mr. Wyckoff? A. Yes, I have.

Q. Now, if you will turn to Rule 2 on page 15, under Rule 2, Mr. Wyckoff, what was the practice with regard to the payment of the lunch period when shifts were worked at a particular location such as New Smyrna?

A. Well, where we had three shifts, the 20 minutes to eat were included in the hours of assignment; in other words, the hours for which we paid.

Q. Well, did this depend upon a particular job or did it apply to all the shop crafts at a particular location?

A. It applied at the location, not to a particular job.

Q. In other words, the example that I asked Mr. Cooke about and he cited the rip track as being only on one shift, this was not excluded because the practice was to pay if shift work were performed by any of the crafts at that location, namely, New Smyrna; is that correct? A. That's right. The location as a whole would be considered as to whether it was on three shifts, two shifts, or one.

The Court: Well, what you are saying is that the rip—  
with the rip track on one and the crafts in the shop  
435 on three, that you bulletined the same hours for the  
single shift that you did for the three shifts?

The Witness: That's correct, sir. The three shifts  
determining the requirement with respect to the meal  
period.

The Court: The three shifts would determine?

The Witness: That's right, sir.

By Mr. Devaney:

Q. And it has also determined whether or not you paid  
for the meal period? A. That is correct.

Q. Now, with respect to the operation at New Smyrna  
at the present time, have the hours which were shown in  
the bulletin issued in November of 1964, have those been  
the hours followed for some period of time? A. Yes, since  
we began hiring after the strike began.

Mr. Milledge: And I object. I think it would be ir-  
relevant as to what has been done under an illegal arrange-  
ment, now decided, determined to be illegal. I object to the  
question and the answer.

436 The Court: Well, I'm going to let it go in the  
record. It's the way they have handled it since they  
started up operations.

Mr. Devaney: Would you mark this for identification.

The Clerk: LL.

(The referenced material was marked Defendant's  
Identification Exhibit LL.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you a document marked for  
identification as Defendant's Exhibit LL.

Will you tell me what this consists of? A. It's a letter  
from Mr. Cooke, dated July 7, 1962, to me; and my re-  
sponse of July 16, 1962, to Mr. Cooke.

Q. Now, without going into the details at all, what was the general nature of Mr. Cooke's letter and your response? What subject matter did it cover? A. Mr. Cooke requested that we increase rates of pay and, in accordance with what he contended to be the requirements of Rule 46, and I responded denying it.

Q. Well, that's all we wanted to know, just for identification. It was his request under Rule 46? A. That's correct.

437 Mr. Devaney: I move that Defendant's Exhibit LL be received in evidence.

Mr. Milledge: The Intervenors have no objection.

Mr. Shapiro: The Government has none.

The Court: Mr. Wyckoff, this is a matter about which Mr. Cooke was questioned on cross yesterday by Mr. Devaney?

The Witness: Yes, sir.

The Court: And he said that he did make a complaint, but he let it die on the vine; he didn't process it to a conclusion then?

The Witness: That's right. It became barred by the time limit provision of the agreement.

The Court: He did nothing about it?

The Witness: That's right.

438 The Court: In other words, this exchange of letters is all your file shows was ever done about it?

The Witness: That's correct, yes.

The Court: It was dropped after that?

The Witness: Yes, sir. He permitted—

The Court: After this exchange of letters?

The Witness: Yes, he permitted it to become barred under the time limits provision of the agreement.

The Court: Yes, sir.

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you Defendant's Exhibit—

The Court: In other words, your testimony is that, as



far as that's concerned, it corroborates his?

The Witness: That's correct, sir.

(Defendant's Identification Exhibit LL was received and filed in evidence.)

439 By Mr. Devaney:

Q. —Defendant's Exhibit LL. Would you look at that and tell me what was the claim presented by Mr. Cooke?

A. Well, Mr. Cooke requested:

"Since all of the railroads of the Southeastern group except Florida East Coast Railway Company have applied the increases in wages provided for in the June 5, 1962 Chicago agreement, it appears to us there should be no further need for conferences with Carrier on this item. It has now become a simple matter of compliance on the part of the Florida East Coast Railway Company with the provisions of Rule 46(a) of the Federated Agreement, which reads as follows:"

And then he quotes it.

Q. Now, this letter was dated July 7, 1962? A. That is correct.

Q. And you responded on July 16, 1962. And what was your position at that time, Mr. Wyckoff? A. I told  
440 Cooke that a review of the average hourly earnings in the Southeastern Territory of employees in outside industry as well as those on other railroads fails to lend any support to his request, and therefore there was no change to be made in the decision that I had previously rendered in my letter of September 29, '61, with respect to his request for a wage increase.

Q. Now, following this, Mr. Wyckoff, were there any further steps taken with regard to the subject matter of the Union's request which refers to the increases given or provided for in the June 5, 1962 Chicago Agreement? A. No, sir. As Mr. Cooke said yesterday, he permitted that

issue to become barred by the time limitation provision of the agreement.

Q. Now, does this reference to the June 5, 1962 Chicago Agreement in turn refer to a Section 6 Notice that the Unions had given to Florida East Coast? A. Yes, it does, the original demand was for 25 cents an hour and it was disposed of by that national agreement with respect to other railroads.

Q. Now, after your response of July the 16th, 1962, did negotiations on the Unions' Section 6 Notice occur? A. Yes. We have had negotiations even after the strike began.

Q. And after the negotiations—were the negotia-  
441 tions themselves followed by mediation? A. Yes, we've had mediation.

Q. And upon the release of the dispute by the Mediation Board, the strike took place; isn't that correct? A. That is correct.

Q. And after the strike, was there ultimately an Emergency Board in that case? A. Yes, there was, almost a year later.

Q. Now, did all of these procedures, the negotiations, Mediation Board, the Emergency Board, all rate to the Section 6 Notice that the Union had given? A. That's correct.

Q. And Mr. Cooke's letter related to the same Notice, demanding that you put into effect under Rule 46 the agreement reached by other railroads; is that correct? A. That is correct.

Q. Now, Mr. Wyckoff, have you at my request made any search of the files of the Florida East Coast to determine whether there had been any prior settlement, under Rule 46, of any nature? A. Yes, I have.

Q. And what were you able to ascertain from your files  
442 with regard to matters under Rule 46? A. I found that there was one case progressed under Rule 46, and it ultimately went to the National Railroad Ad-

justment Board and was disposed of by the Second Division in Award 1182, if I recall the number correctly.

Q. Now, what did that matter involve, Mr. Wyckoff?

A. It involved the manner in which fractional cents would be applied to the wage increase.

Q. And which provision of the agreement is that? Do you still have the Shop Craft Agreement before you?

A. Yes. It's Paragraph (b) of the Rule.

Q. And would you for the record read that, so that we will have that firmly fixed? A. Paragraph (b) provides:

"In fixing the rates of pay, when increases or decreases are made, amounts under one-half ( $\frac{1}{2}$ ) cent will accrue to the benefit of the Railway, and amounts one-half ( $\frac{1}{2}$ ) cent and over, will accrue to the benefit of the Employees."

Q. And that provision has no relation to the portion of Rule 46(a) which refers to the Southeastern Territory?

A. That is correct.

Q. Now, from your files, did you find any other record of an interpretation or application of 46(a) of the 443 agreement? A. No, I did not.

Q. Now, have you taken any other action? I believe Mr. Cooke said that this was handled by—what was the Department previously called that handled this? The Motive Power? A. It was the Mechanical Department.

Q. Now, have you taken any other steps to ascertain whether they have any record of any such settlement? A. Yes, I checked with Mr. Matthews, who is a Special Assistant to the Chief Mechanical Officer, the head of the department. He has been with the department for almost 40 years and he told me, to his knowledge, there had been no such increase.

The Court: I'm sorry. I have lost something here, Mr. Devaney. No such increase as what?

Mr. Devaney: I'm sorry. No such increase? I believe—

The Court: That's the witness' answer. I'm not quite sure what he means.

Mr. Devaney: We are referring to the provision—

444 The Court: If I'm going to take hearsay from Mr. Matthews, I want to know what it is I'm getting.

Mr. Devaney: Well, let me clarify it by asking the witness.

The Court: Yes, sir, that's what I want.

By Mr. Devaney:

Q. Now, specifically, Mr. Wyckoff, what did you inquire of Mr. Matthews about? A. Mr. Cooke yesterday referred to a two cents increase to helpers, as I recall it, based upon rates of pay that he said were being paid to the Atlantic Coast Line. And in checking with Mr. Matthews, as I said a minute ago, he told me that to his knowledge there was no such increase.

Q. And you have checked your files and did you find any record of any such increase? A. No. In fact, I checked back in the history of wage increases in the Mechanical Department as far as 1917.

Q. It would be safe to say that, if this matter exists, you have been unable to find any record of it? A. That's correct.

Q. Now, in the time you have been with the Florida East Coast, Mr. Wyckoff, has there been any occasion on which  
445 you have handled, other than this one claim presented by Mr. Cooke in 1962, any claim by any of the shop crafts that Floriad East Coast was required to pay wages paid by other railroads? A. No, I have not.

Mr. Devaney: I would like to mark this for identification as—

The Clerk: MM.

(The referenced material was marked Defendant's Identification Exhibit MM.)

Mr. Devaney: And this marked as NN.

(The referenced material was marked Defendant's Identification Exhibit NN.)

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you the document marked for identification as Defendant's Exhibit MM. Without going into any of the content, would you simply tell me for identification what that is? A. It's a photographic copy of a newspaper clipping from the Florida Times-Union, dated August 15, 1964.

Q. Now—

The Court: '64?

446 The Witness: Yes, sir.

By Mr. Devaney:

Q. Now, does that newspaper clipping contain a picture and the name of any representative of the Carmen's Union? A. Yes, Mr. Katsikos, who I understand is Secretary and Treasurer of the Carmen's organization.

Q. Now, I hand you the document marked for identification as Defendant's Exhibit NN, and for identification, would you tell me what that document is? A. That is a photographic copy of a newspaper clipping from the Florida Times-Union, dated July 21, 1964.

Q. And does it contain what is purported to be a quotation from the testimony of the same representative of the Carmen's Union? A. It's a reference to a letter which he had written, yes.

Q. Now, was this person a member of the Committee which Mr. Cooke referred to as having to approve, under Rule 2, any change in hours? A. It's my understanding that he was, as Recording Secretary of the Local.

447 Mr. Devaney: I move that Defendant's Exhibits MM and NN be received in evidence.

Mr. Shapiro: I object, Your Honor. The newspaper clipping is not the proper way to bring forth facts which are referred to in them. It's nothing but a hearsay form.

Furthermore, I don't see that these matters have anything to do with the matters in issue.

Perhaps Mr. Milledge would like to look at them.

Mr. Milledge: The Intervenors join. I'm sure I know what they are.

Your Honor, I might point out just one other thing: Mr. Katsikos lives in Miami, Florida. Mr. Wyckoff has already told the Court that, in Miami, Florida, in Hialeah, where any Committee might work to approve starting times, the starting times are the same as they were before and the 20 minutes has been granted.

The issue which has been raised pertains to New Smyrna, where obviously Mr. Katsikos, as Recording Secretary of the Local Union in Miami, would have no 448 jurisdiction.

And further the objection on the basis of relevancy.

Mr. Devaney: Your Honor, if I may make a brief comment before you rule.

In the first place, Mr. Milledge's assertion that we are concerned here with what has occurred at one point, I think is not well taken. We are concerned with the provision of the agreement itself and whether the alleged violation of the agreement occurs in New Smyrna or at some other point, we are concerned with what the Carrier is required to do under strike conditions with respect to a provision that requires approval of the Union which is on strike, and which the General Chairman of that Union and President of System Federation 69 has testified that approval would not be given in any event.

Now, this does not represent a change in the rate of pay that people formerly were getting or the denial of a paid meal period, which they would otherwise be provided. And I think that this newspaper clipping of July 21st, marked 449 for identification as Defendant's Exhibit NN, contains a direct quotation from a letter which Mr.

Katsikos had written. Mr. Katsikos was an official, Recording Secretary of Local 555, and as an official of that Union, I believe that it does bear on showing the intent of at least one member of that Union concerning the conflicts between the Union and the Railroad during this strike condition.

Now, that is the purpose that it is offered. Mr. Cooke has already testified that, because of the strike, he would not have been in favor of approving any change in hours.

Mr. Milledge: Your Honor, that's quite a misrepresentation of the testimony.

The Court: I recall the testimony.

Mr. Devaney: So I think it is material and relevant, simply to show further this basic division. As Mr. Katsikos has put it, he has indicated that this is in terms of a conflict between the Union and the Company; and this is the sole purpose for which this is offered. And for that purpose, we feel that it is material and relevant.

450 The Court: Conceding its competency, which is, it seems to me, a rather violent concession, I don't see any materiality or relevancy. What you understand is that Katsikos is a member of the Local Committee at Miami; is that right?

The Witness: Yes, sir. I understand that.

By Mr. Devaney:

Q. Mr. Wyckoff, did Mr. Cooke, as General Chairman of the Brotherhood of Railway Carmen, receive copies of the bulletins issued after you began operations on February—or in advance of your beginning of operations on February 3rd, 1963? A. We mailed them to him. I assume he did.

Q. Did he acknowledge or write you indicating that he had received such bulletins? A. He acknowledged—he wrote protesting advertising of jobs, saying that his people were on strike.

The Court: If there is an objection, I'll strike that statement.

Mr. Milledge: Pardon?

451 The Court: If there is an objection, I'll strike that statement.

Mr. Milledge: We object.

The Court: The answer is stricken. If you've got letters from Mr. Cooke, why, let's see what the letters say, not what this witness relates them as saying.



Mr. Devaney: I thought I had the letter there, Your Honor. I don't have Mr. Cooke's letter at the moment. If I can locate a copy of it, I'll offer it in just a moment.

By Mr. Devaney:

Q. Mr. Wyckoff, I hand you this document and ask: Is that the same decision of the Adjustment Board that you referred to earlier? A. Yes.

Mr. Devaney: Your Honor, we can either mark it as an exhibit or I'll simply submit a copy of the Award. And this is Award 1182, Docket 1107 of the National Railroad Adjustment Board, Second Division, and the date 452 of it is May 13, 1947.

The Court: Well, that's the case—what was referred to as the one case they have had—

Mr. Devaney: That's correct, Your Honor, that involved—

The Court: Rule 46(b).

Mr. Devaney: —Rule 46, Your Honor.

Mr. Milledge: And we have been told—

The Court: Rule 46(b), which neither side contends has anything to do with it.

Mr. Milledge: That's right.

Mr. Devaney: Your Honor—

The Court: 46(a), as I understand it, is the—

Mr. Devaney: That is correct, but what we have said, Your Honor, is that the search of the—

453 The Court: This is a decision that a half-cent and under goes to the Railroad and a half-cent and over goes to the man?

Mr. Devaney: That's Correct. And what we have—

The Court: It doesn't bear on this controversy in any way does it?

Mr. Devaney: Mr. Wyckoff has searched the files, however, with regard to all matters which would relate to Rule 46.

The Court: Well, I had his testimony, uncontradicted as yet, that he can find no decision bearing on 46(a).

Mr. Devaney: That's correct, Your Honor; the only one being the 1962 claim filed by Mr. Cooke.

The Court: I'm going to take his word for it. I don't want this, unless you insist on putting it in.

Mr. Devaney: I simply—if you want it, it's here  
454 and available.

The Court: I've got an office full of papers in there I don't have time to read.

Mr. Devaney: No further questions, Your Honor.

Mr. Shapiro: I have no questions.

### Cross Examination

By Mr. Milledge:

Q. Is it your testimony on this 46, Rule 46(a), that there has been no increase over the years in wages based upon an interpretation of 46(a)? A. I have checked the records and I can find no such increase. And I say, as I said, I also checked with Mr. Matthews of the Mechanical Department.

Q. How about when—was Mr. R. B. Hunt the head of your Mechanical Department at one time? A. Yes, he was.

Q. During what period of time? A. I can't answer it; it has been a number of years ago.

Q. And of course many disputes do get settled on  
455 the property; do they not? A. Well, certainly they get settled, but there are records of the negotiations.

Q. And you find no records of such negotiations in which helpers' pay was raised two cents by Mr.—in negotiations with Mr. R. B. Hunt, settled on the property? A. That's right. And in checking the scale of rates, I find no two cents an hour increase.

Q. All right. And you have checked the records thoroughly? A. I checked the records I have available, yes.

The Court: Well now, what does that mean? What you've got in your hip pocket or what?

The Witness: That are available in the office, Your Honor.

The Court: All right.

By Mr. Milledge:

Q. Now, during the last ten years, up until 1962, this Railroad has been a part of the Southeastern Carriers Conference Committee, has it not? A. It has joined voluntarily the Southeastern Carriers Conference Committee in the individual—

456 The Court: That's the only way it could join.

The Witness: Sir?

The Court: You have been a member—the only way you could join would be voluntarily. Nobody put a gun on you to get you in there.

The Witness: Yes, sir, but—

The Court: You have been a member since 1962.

The Witness: But there's a Committee set up for each separate demand, Your Honor, and each time there is a decision made whether to join or not to join.

The Court: Excuse me. You've already answered.

By Mr. Milledge:

Q. So you have been a member and you have been paying the same rates as other railroads in the Southeastern Conference, up until '62? A. But when you say "a member", it's not a continuing arrangement. If—

457 Q. We are not contesting your right to withdraw.

I'm just asking you if you've been a member up until the end of '62? A. To my knowledge, the Carrier has participated in most of them, yes.

Q. And you paid the same rate for shop crafts as all the other Southern railroads during—since the second World War, up to 1962? A. Yes. Any increases that come out of those national negotiations, we paid where we were a member of them.

Q. So you have been paying the same as the Southeastern Territory up until 1962, when you had, when you pulled out of national handling and had this separate dispute? A. We've been paying the same as Southeastern railroads, not Southeastern Territory, which includes outside industry.

Q. Now, you do acknowledge that the Rule 2 does require you or some other person in FEC management to negotiate shifts under the System Federation 69 contract?

A. It provides that you will handle with the Local Committees.

Q. All right. And you didn't do that when you bulletined these jobs in November of this Year? A. No, because the Local Committee—

458 Q. Well, you didn't? A. —since the strike—  
The Court: Just answer the question, please.

By Mr. Milledge:

Q. You did or you didn't? A. Not in November, no.

Q. No. And did you invite them to negotiate these changes in time? A. No, because of our experience since the strike began, they refused to come in.

Q. You didn't invite them; you didn't send a letter; you didn't ask them to negotiate this? A. We have invited them on prior occasions and they didn't come in.

Q. Now, how many shifts are you running at the present time at Bowden? A. Two.

Q. And are you paying for the lunch period at Bowden? A. Yes, we are.

Q. So Bowden is a situation in which you have less than three shifts and you are bulletining them 8 hour shifts with a 20 minute lunch period? A. Because of the re-  
459 quirements of the service at Bowden, that's right.

Q. So your interpretation of the contract, saying that you have a free hand any time you have less than three shifts to abolish the lunch period, is, even in present practice, is not what you follow? A. Well, no, I don't agree with that statement at all.

Q. Well, you did admit that you have less than three shifts at Bowden at the present time and you pay for the lunch period; you admit that? A. Yes, because—

Q. All right. A. It's an originating terminal and we have to have men on to inspect the trains as they leave or arrive.

Q. And of course, I'm speaking of men covered by—we are speaking of men covered by System Federation 69 agreement? A. That's correct.

Q. Yes. All right.

Mr. Milledge: That's all we have, Your Honor.

The Court: Redirect examination?

Mr. Devaney: Yes, sir.

#### 460 Redirect Examination

By Mr. Devaney:

Q. What was the practice, Mr. Wyckoff, with respect to the payment prior to the strike of the meal period for employees who were required to perform continuous service?

A. I'm not sure I understand the question but, where we had three shifts, continuous service around the clock, we paid for the meal period.

Q. Well, what about places where you may or may not have had the three shifts but where the individual was required to remain on duty on a continuous duty, what was the practice with respect to the payment for the meal period? A. Well, if we required them to remain on continuous duty, we paid them for the meal period. But we had other points such as Miller Shops where they were not required to remain on continuous duty.

Q. Now, is the reference in Rule 45, that is on page number 48, is this reference related to individuals who are required to remain on duty although the operation may not be on a three-shift basis? A. Rule 45 has reference to intermittent service and provides that eight hours work, exclusive of the meal period, shall constitute a day's work.

Q. What does "intermittent service", what does  
461 this mean? A. Where an individual doesn't work continuously; in other words, his assigned hours are split up.

Q. Well, what about the last part that says that limitation, this provides:

"For those whose duties do not require continuous service".

What does that refer to? A. That means where you split the shift, where he doesn't have to stay on continuously for eight hours.

Q. Now, what was the practice prior to the strike, Mr. Wyckoff, at Bowden and other originating terminals where people were required to be on duty? Did you pay for the lunch period? A. Yes, we kept them on continuous.

Q. And you paid the lunch period? A. That's correct.

Q. And that is the practice you now follow? A. That's correct.

Q. Now, what is the nature of the work at New Smyrna?

A. Well, New Smyrna is basically a major repair facility.

Q. Now, what was the nature of the work at Miller Shops prior to the strike? A. It was—well, we had  
462 several types of work but it was a major repair facility prior to the strike.

Q. Now, at Miller Shops, were the people required to remain on duty because of the movement of trains? A. No, they were not.

Q. Are they required to be on duty at New Smyrna now because of the arrival or departure of trains? A. No, they are not.

Mr. Devaney: No further questions.

#### Recross Examination

By Mr. Milledge:

Q. The pre-strike situation at Miller Shops was negotiated with the relevant Committee; wasn't it? A. I can't answer that. I don't know.

Q. And as a matter of fact, it provided for a one hour lunch period? A. The bulletins have thirty minutes meal periods.

Q. Well anyway, you have no reason to doubt that it was negotiated, just like it was supposed to be under the

contract? A. You are saying it; I have no way of knowing. I didn't negotiate it.

Q. All right. Now, this Rule that you just mentioned, Rule 45, talks about intermittent service at outlying points? A. That's correct.

Q. That doesn't mean Bowden, New Smyrna, Hialeah, or any of those places, does it? A. No, outlying points.

Q. Yes.

All right, the bulletins that were introduced here a little while back about New Smyrna, they don't show that people go off duty, do they? They just show that they are on from 8:00 o'clock in the morning until 4:30 in the afternoon? They show them on duty from 8:00 o'clock until 4:30, don't they? A. I believe they show assigned meal period, thirty minutes.

Q. They are quite different from the Miller Shops?

Mr. Devaney: You are referring to New Smyrna and I don't believe I'm aware of what you are referring to.

Mr. Milledge: No, excuse me.

Mr. Devaney: These happen to involve Miller Shops, at New Smyrna.

By Mr. Milledge:

464 Q. The ones that are marked Plaintiff's Exhibit—or Intervenor's Exhibit 1, New Smyrna Beach, Florida, show on duty from 8:30 until 4:30 p.m., less 30 minutes meal period? A. That's what I said, yes.

Q. Yes.

It doesn't show them off duty during that 8½ hour period. A. Well, it shows that they get a 30-minute meal period.

Q. Now, the Millner Shops bulletins—the negotiated pre-strike bulletins, showed them being off duty during the period of time; did they not? A. No.

It said working hours 7:00 to 12:00 and 12:30 to 3:30.

Q. Yes. A. So obviously the thirty minutes was the meal period.

Mr. Milledge: That's all we have.



Mr. Devaney: Nothing further, Your Honor.

465 The Court: Come down.

(Witness excused)

Mr. Devaney: That was the only witness we intended to offer at this time, Your Honor.

The Court: All sides have closed their evidence?

Mr. Milledge: Yes, Your Honor.

The Court: All right.

You may proceed.

466 Argument by Mr. Devaney

Mr. Devaney:

This case involves, of course, the Application of the Defendant for the approval of employment practices, which is made pursuant to the provision of the Order of the Court of October 30.

The hearing has demonstrated quite clearly, I believe, that since the Carrier resumed operations on February 3rd, 1963, that it has followed a program of hiring and training of employees as rapidly as it had people with qualifications available to them and who were willing to come to work. This program has not diminished insofar as the Carrier's desires are concerned, since the resumption of operation on February 3rd.

It is significant to note, however, that the number of applicants who have come to the Railroad making application or who have been recruited by the Railroad has varied widely, and since February of this year have fallen overall quite precipitously.

Now, the exhibit which we introduced, our Exhibit II, on which we showed the total number of applicants for 1963, was 2,035. For 1964, for the ten months through  
467 October, there had only been 1,122 applicants.

Now, Florida East Coast hired, of the non-operating crafts, 542 individuals in the calendar year 1963, and in the first ten months of 1964 hired 308. And I believe

that the testimony indicates that there has been a further increase of some five to eight people since November, during the month of November, so that the total hired in 1964 would be somewhere in the neighborhood of 313, or fifteen persons.

Now, the total number hired since the strike began in '63 and '64 of 850 non-operating employees has necessitated the training of these people, since it is clear that the Carrier was unable in the main to obtain fully qualified journeymen for the jobs that it had available. Indeed, this was conceded by the United States in the opening stages of this case, in which it stated very candidly that it conceded that the Florida East Coast had not been able to hire journeymen because the Unions had not been willing to supply or permit their members to work. And that, in the Railroad parlance in the main, this is what "journeyman" means.

468 Now, in addition, the evidence fully shows that the training of people for many of the positions involved procedures and techniques which are unique to the Railroad industry. By that, I mean that many of the jobs, indeed most of the jobs, be they essentially accounting or shop craft jobs, involve special training unique to the Railroad industry. And for this reason, it is necessary to train these people in the procedures of the Railroad industry; that this training period is a long one is fully demonstrated by the provisions of the Shop Craft Agreement showing that the normal apprenticeship period is four years. While the Clerks Agreement and others do not have apprenticeship provisions per se, the testimony and the evidence makes it perfectly clear that a considerable period of time is required to train people for many of the more skilled jobs.

The evidence shows that in the initial stages of the strike during the first ten months of 1963, that a considerable number of employees were hired, employees who possessed the less skilled qualifications and people who could be used

on an interim temporary basis and who are now and  
 469 were then still in the process of training to become  
 the fully qualified individuals who handle the various  
 jobs.

Now, this has ranged from the shop crafts, where people  
 have been hired with as much ability as we can locate  
 people and where they have been slotted into the training  
 program in accordance with their past experience and abil-  
 ities, to the clerks who have been placed in training for  
 various jobs, including such jobs as rate and division clerks,  
 to the training of people in each of the departments.

Now, in our earlier appearance in making an estimate  
 of the number of employees which would be required to  
 comply with the prior agreements, having no better stand-  
 ard than taking the number of people in those crafts prior  
 to the strike and the number that we had at the time, the  
 figure of 600 came in as the estimated number of additional  
 people who would be required to comply with the old agree-  
 ments.

Now, we have shown here, upon an analysis and study of  
 each department, that what the actual additional require-  
 ments are to comply fully with the existing agreements of  
 the non-operating Unions. Now, we went through de-  
 partment by department and have shown why the  
 470 number of people required before the strike has  
 been reduced.

Now, this is a total figure of 317 people. We showed,  
 for example, that in the Mechanical Department, that the  
 reduction of 82 had come about primarily as a result of not  
 performing the AER, that is, interline optional repairs.  
 This means, Your Honor, that on cars belonging to other  
 roads, there are many repairs which are mandatory and  
 must be performed and those are being performed. The  
 others are these optional repairs which any individual  
 carrier may make or may not make. It has resulted in  
 part from the discontinuance of the bearing manufacturing,  
 which discontinuance occurred prior to the strike.

It has occurred in part because the Fruit Growers Express is performing their own repair work and sending cars directly to us from their shops.

We have shown in the Maintenance of Way Department that 112 employees previously required are not now required because of the addition of new aquipment, and this was enumerated, including the Caterpillar front end loader with winch to unload switches and turnouts as units. This one unit will do, with four men in three hours, what  
471 formerly required twelve men a period of three days.

The track lining equipemnt now does with an operator and a laborer what previously required eight to ten men.

The tie cars have on them an unloading device which unloads the ties. This previously required a crew of ten to twelve men to throw the ties out of the cars.

The surfacing work, the "hi-rail" cars which are now radio dispatched, fully equipped, containing a great variety of machinery and equipment.

And all of these have added up to the fact that the Maintenance of Way can be performed with some 112 fewer people than was previously required.

Now, there is only one category in this Department, Your Honor, where work is not being performed that was previously performed and that is one bridge gang. This work is being contracted and is not, in fact, being performed by employees of the Florida East Coast; so there is no violation as to the payment of their wage rate.

We have also shown that, where the Carrier does not have sufficient qualified personnel, it always has had the right to contract out the work; that we have brought this  
472 question into the proceeding to demonstrate that we are of necessity having to contract out work where we do not have the qualified personnel. And we wanted to make it clear that the practice existed so that there could not later be the contention that we were not complying with the agreement.

Now, in the Signal Department, 35 less people are required, primarily because of the elimination of this 4400-volt line, which in turn made unnecessary transformers which were a source of considerable maintenance attention, relays, substations, and so forth.

In addition, the CTC has reduced the number of signals, has reduced the number of insulated joints. And the Microwave signals are now transmitted through the rail; all of which has reduced the amount of maintenance that we had.

And the Signal Department, as was true in the Maintenance of Way Department, the installation of CTC has been contracted out for the reason that we do not have sufficient qualified personnel to perform this work.

And in the Transportation Department, 67 less  
473 people were required, chiefly because of the situation on the LCL freight.

Now, as we have shown, while LCL freight has been handled since the strike on a permit basis, since the beginning of the strike we have been able to handle, even on a permit basis, only by having the consignee or consignor loading or unloading its cars. Now, on a permit basis, Florida East Coast is actually handling as much, indeed more, LCL freight than other railroads, not only in this area but throughout the country, are presently handling in the main.

Furthermore, we have amended our tariff to comply with the provision on LCL freight, which the Seaboard already has in operation.

Now, the Accounting Department has 10 less people required because of the expansion of the machine accounting to other records which were not previously handled by machine accounting, and by the elimination of certain reports which we have found to be unnecessary in view of this availability of other information on the machine accounting records.

In the Freight Traffic Department, 2 less people  
474 are required as a direct result of use of the Zerox machine to copy the various correspondence and to reduce the amount of typing and collating of material which has previously been done. And also the use in the Freight Traffic Department of machine accounting records which are essentially made for use by the Transportation Department.

Now, in the Personnel Department, there actually has been an increase of one person over what the Department had prior to the strike and there is a further need for one additional person, and this job has not been filled.

Now, with these requirements, the Carrier bulletined the number of jobs immediately required which were 114, and between November 2nd and November 3rd, it bulletined 114 additional jobs. Now, we received from those on strike a total of three bids. Only one person, in fact, reported for work. Now, of the other 113 positions, we received bids only from people who were already working, and this in no way represented an increase in the total number of persons required to permit the Carrier to comply fully with the agreements.

Now, we have, as of November 13, reinstated  
475 all the provisions of the non-operating Union agreements as to wages, hours, job descriptions, and so forth, as was illustrated by Defendant's Exhibit JJ.

Now, this is a copy of one of the Notices sent to one individual and similar notices were sent to each other individual where a change in rate or hours or in job description in anyway was involved; so that the individual was informed of the change to comply with the provisions of the prior agreement.

Now, the assertion has been made that the meal period and the starting time for the shop crafts is not in accord with the provisions of the Shop Craft Agreement.

Now, as Rule 2 of the Shop Craft Agreement shows, and this is Plaintiff's Exhibit 4C, on page number 15, Rule

2(a) provides that there may be one, two or three shifts employed. It then says that the starting time on any shift shall be arranged by agreement between the Local officers and the employees committee, based on actual service requirements.

Rule 2(b) provides that:

“The time and length of the lunch period shall be subject to agreement, preferably within the limits of the  
476 fifth hour, except where three shifts are employed, when the lunch period shall be 20 minutes without loss of time.”

Now, in support of this, Mr. Cooke stated that, prior to the strike, at New Smyrna Beach the lunch period was 20 minutes and that this was paid for. Mr. Cooke admitted, however, that three shifts were not operated at New Smyrna. It has been shown that there are only two shifts being operated at New Smyrna at the present time. And it has further been shown that the miller shops, prior to the strike, which was another repair facility which the Defendant operated, it, prior to the strike, was operating only one shift at Miller shops and it paid the employees only for the time worked and not for the meal period; and further, the bulletins show that the lunch period was 30 minutes.

Now, in conformance with the provisions of the agreement, the Defendant has since the resumption of operations operated these hours at New Smyrna since February of 1963. Now, to the extent that agreement is required under the provisions of Rule 2 of the Shop Craft Agreement, I respectfully request that, if this has not already  
by implication become a part of our Application, our  
477 Application be amended to include a request for exemption during the period of this strike for the compliance with any provision such as Rule 2 that requires the agreement between the employer and the Union on such a matter as the change in starting time.



Now, it is clear from the testimony here, Your Honor, that because the shop crafts are on strike that the concept of making a request that they agree to a change in hours would certainly not be well received. And this is frankly admitted by Mr. Cooke, who said that he did not believe that he would have agreed to any such request.

Now, the provisions, the whole intent, the whole purpose of the agreement is to provide for the requirements of the service. And this, of course, is recognized in Rule 2, which says:

“Based on actual service requirements.”

Now, this is the reason for the necessity of operating the hours that we have since the resumption of operations. The actual hours must conform to the requirements of the service. That is all that has been done, and because  
 478 there has been no conceivable prejudice in any way to the rights of any person, they have not been deprived of the meal period that they are entitled to under the contract, then we feel that we are already in compliance with the agreement by operating in the way that we have operated.

Now, the assertion has also been made that the placing of new employees in a training program, that is, the apprentice program, in accordance with their experience, is not in accord with the agreement.

Now, first, Your Honor, let me say that I don't believe that any of us could or would contend that this agreement was negotiated with the idea that we were going to be faced with a strike. I don't believe that the provisions of this agreement were intended to be read except in the context of the shop crafts working and continuing to work. It was not—the agreement was not written with the idea that the shop crafts were not going to perform service.

Now, we begin with this, I believe, as the basic assumption: What do you do when an unforeseen contingency comes into being that the parties themselves did not  
 479 provide for in their agreement?

And we believe that the manner in which the Railroad has operated with respect to the placing of new employees into this training program, in accordance with their experience and ability, is entirely in accord with the agreement.

In the first place, there is no provision, as Mr. Cooke has admitted, which prohibits the Carrier hiring men with experience and placing them into the proper slot of the apprenticeship program. And we concede that there is no provision which specifically authorizes this to be done.

Now, that there is some recognition that, even when the shop crafts were working, there were times when this had to be done is also demonstrated by the provision which was negotiated, which appears on page 84 of the agreement, the memorandum of March 4, 1942.

Now, this was a provision negotiated during World War II when there was a shortage of personnel and under this provision, when again the shop crafts were operating but despite the fact that they were working there was this shortage of personnel, and in this agreement provision was made for the advancement of apprentices.

Now, in keeping with this over-all problem that the Carrier faces, this is really all that has been done: Florida East Coast has not gone out and hired people with no prior railroad experience and brought them in and said, "We are going to qualify you and give you any benefits as a journeyman." We recognize that these people are not so qualified and we have had to continue their training for some period of time, depending upon their prior experience and their abilities. This is what has been done. They have been placed in this training program where their experience and ability would justify placing them and when, and only when and if, they have by additional experience with the Railroad attained the additional qualification and experience necessary to be advanced to the journeyman status, have they been so advanced.

We believe that this is fully in accord with the provisions and the intent of the agreement as to how the over-all apprenticeship or training program is to operate, recognizing as we do, Your Honor, that the agreement was never written with the express idea that there was  
 481 going to be a strike and a refusal on the part of any of these Unions to perform service over an extended period of time.

And finally, we believe that the strike conditions under which we are operating necessitate our operating in precisely the way that we have. It is the only way that we can find employees, namely, by taking those with as much training, skill and experience as we can find, utilizing their abilities and training them at the same time so that they can ultimately perform all of the jobs, all of the skills that are required of their jobs.

Now, Your Honor, the assertion has also been made that, under Rule 46(a), Florida East Coast is required to pay some different rate of pay because other railroads are paying rates higher than the Florida East Coast.

Now, we believe, on the surface, Your Honor, that this at best involves an interpretation and application of the contract, and that this matter should not properly be before the Court, since it is a matter of interpretation and application of an agreement which is within the exclusive jurisdiction of the Railway Adjustment Board. But if the

Court does not agree with this point and feels that  
 482 the question must be decided, we think there can be no doubt whatever that Mr. Cooke, in 1962, submitted a claim to the Florida East Coast involving the assertion that Florida East Coast was obligated under Rule 46(a) to make the same wage payments that had been agreed to in the national settlement in Chicago. This claim, and this involved, this was a claim for the over-all wage rates which had been agreed to in the national settlement—this claim was denied by the Carrier and the Union failed to take any further action as provided by the agree-

ment and the claim became barred; so that even if they had a claim, it has now become barred because of its presentation and the fact that the Union did not process it. And under the terms of the agreement, the claim has become a complete dead issue and may not be raised again in this proceeding.

Mr. Cooke has also made reference to asserted settlement—

The Court: What provision of the agreement are you referring to?

Mr. Devaney: 46(a), Your Honor.

483 The Court: I know, but what provision are you referring to as making it res judicata, so to speak?

Mr. Devaney: The provision of the agreement.

Mr. Milledge: I will be glad to be of assistance, if I can be of assistance to the Court, I will be happy to.

The Court: All right, sir. What is he referring to? Maybe you can help him.

Mr. Milledge: The retroactive part, the wage claims based upon Mr. Cooke's assertion of an increase that was due at that time. The time claims have to be made within 60 days or lost.

The Court: Yes, sir.

Mr. Milledge: So, for those people working during '62 who should have been paid more money during '62, they've lost their time claims by not pursuing them.

That's the only thing in the contract.

484 Mr. Devaney: Your Honor, the agreement to which I made reference is an agreement of August 21st, 1954. Mr. Wyckoff has advised me that this is not printed as a part of what has been introduced. It is not in this book. (Indicating)

Now, I do not know whether it's in one of the other documents which were introduced at the May hearing.

If I may, this is part of the—

The Court: Well, it would be pretty hard for it to be introduced in May when it came out in August.

Mr. Devaney: No, but—

The Court: It would seem to me.

Mr. Devaney: Mr. Shapiro said that all of the supplements to this agreement have been—or Mr. Milledge said that all supplements have been introduced. I do not know whether this supplement—

The Court: It wasn't in existence in May.

485 Mr. Devaney: I beg your pardon?

The Court: The agreement was entered in August. It wasn't in existence in May. It couldn't have been put in.

Mr. Devaney: August 21st, 1954, Your Honor, ten years ago.

The Court: I thought you said '64.

Mr. Devaney: No, Your Honor.

The Court: I'm sorry.

Mr. Devaney: It's ten years before.

The Court: Excuse the interruption. I thought you were talking about something this August.

Mr. Devaney: Now, if I may, I will be glad to have and I will show this to the Court at this time and we will be glad to have a copy made if it has not been made.

(Tendering instrument to the Court)

Now, at—there are two provisions of this agreement.

486 One is as to filing of the claim, which Mr. Milledge made reference to. And the other is the appeal from the claim after it's denied.

Now, Mr. Cooke's letter clearly constituted a claim by Mr. Cooke, which was denied on July 16th.

The Court: Excuse me. This thing, if it's not in these papers, ought to be. You agree with that, don't you?

Mr. Milledge: Yes; yes, Your Honor. If it is not, it ought to be.

The Court: If it isn't, it ought to be and I'm going to permit—I'll permit Mr. Devaney to supply it.

Mr. Devaney: Now, we have, the Carrier has made a search of its records, Your Honor, and we have found no

record of the settlement or adjustment which Mr. Cooke has referred to. And please understand that I am not asserting at this time that no such settlement ever existed, but only that we can find no record that there ever was such an adjustment, either from the records or from any adjustment in the wage rates.

We further find that the only adjustment, or matter which has involved any part of Rule 46, was the 487 decision, the Adjustment Board decision in 1182 by the Second Division in 1947, which involved the provisions of 46(b). But that's the only case involving any part of Rule 46 that we have been able to locate from our records.

Now, whether or not this existed at one time, there certainly can be no doubt that the claim which was made in 1962 was denied for the reason that the provisions of Rule 46(a) did not obligate the Florida East Coast to pay the same rates that other railroads had paid; that this claim has been barred by the provisions of the agreement that I previously referred to, and copies of which will be supplied to the Court. And having permitted this claim to be barred, as Mr. Cooke has admitted he did by not taking a further appeal, it certainly could not be raised in this proceeding.

Now, what has the result of this hiring and training program been, insofar as the Florida East Coast is concerned?

Well, the record is very clear on this: It leaves not the slightest doubt that the Florida East Coast has, since it resumed operations, attempted to hire and train employees as rapidly as it could.

488 We are left today with an additional 114 people, if we are fully to comply with the provisions of the existing agreements. These positions are positions which, almost without exception, require a considerable amount of skill and training. And because we do not have the people who are fully qualified, we can continue to operate and handle the volume of traffic that we are presently carrying only by using the people that we have by crossing

craft lines and seniority districts to perform operations that these people are the only qualified people available to perform; by the continued use of our supervisory personnel, both exempt and non-exempt, to perform those limited functions that the people we do have are still not fully qualified to perform; that we must continue to contract out work where we do not have the qualified personnel to perform it with our own employees.

As I mentioned earlier, the work that we specifically made reference to as illustrating this problem was the bridge gang work which is contracted out, and the installation of CTC. Now, this represents the kind of work where we do not have the qualified personnel ourselves on  
 489 our own payroll to perform it and we have contracted it out.

Now finally, on the bridge tending, the Government has conceded that it believes the request in Paragraph No. 6 of our Application was reasonable and that it was not objected to.

Now, the Union has raised a question concerning the use of supervisory personnel or contract employees to perform this service. And we have shown, Your Honor, that these are critical points to the continued operation of the Railroad and, because they are sensitive points as part of the over-all security operation during the continuance of the strike, that this has been and is now being performed either by exempt supervisory people or is being contracted out as part of the over-all security program.

Now, we believe that because of the sensitivity of these positions that this must be continued. And we have shown that the attempts at sabotage have not stopped but have continued right up to the present time.

Now, there was an agreement at the outset of the hearing as to Paragraph No. 3, which was our request as to  
 490 the apprenticeship ratio and to the age limitation.

Now, those provisions are the provisions which I believe that all parties concede relate directly to the operation, continued operation, of the Florida East Coast.



Now, at the outset, there was a question as to whether or not the requests were sufficiently specific. There is no doubt from the evidence and the testimony as has been developed here that the problem of pinpointing any one supervisor and saying that he performed one operation or two operations which would involve scope work is simply not possible. This is an over-all problem where there are certain parts of the work in the training of these new employees who have not yet fully qualified, that the supervisors must not only, in the course of training, show these people by doing it but he must also perform those parts of the job that they are not qualified themselves to perform; and that in many areas, these people are the only people who are fully qualified to perform this operation.

We have shown that many of these operations are immediately critical to the continued operation of the Carrier.

491 Now, we have said and the evidence leaves no question but, if we cannot continue to operate in the manner set forth by crossing craft and seniority, the craft lines and seniority districts, and the use of our supervisory people to perform this, certain portions of this work, and so forth, that the operations of the Railroad would have to be severely curtailed to a minimum of 30 to 50% in the reduction of freight we are currently handling.

We believe that the showing here leaves no doubt whatever that the requests that we have made are reasonable requests.

Now, we have further shown, Your Honor, that the suggestion of the United States that there be a time limitation of four or five weeks is completely and impossible to comply with for the simple reason that you cannot train people in any such period of time. We have been endeavoring to bring our force up to the point that we can provide the service since February of 1963 and, in training these people, the jobs that we now need, the 114 jobs almost exclu-

sively consist of jobs that do require extensive training periods. This is the skill that we are lacking and it simply cannot be provided in any such period of time. We  
 492 are endeavoring to do so. We have endeavored to do so since we resumed operations. We cannot do more than we have, namely, to hire and train as rapidly as our abilities permit us to do, and our ability to train people is directly limited to the number of individual supervisory employees available to train and to assist in the performance of part of this work.

Now, the other two matters, Your Honor, then, relate to the seniority rosters. And we have shown again the reason for the non-furnishing of the seniority rosters from the commencement of the strike was the harassment of employees, including the circulation of such lists of employees entitled "Scab List". And as Mr. Thornton testified, which were not limited only to the names of the employees working but even referred to their relatives. It was because of this activity that we felt there was no choice but to protect in some manner the names of the employees, to protect them from further harassment.

Now, the only limitation that we ask here or have in the past asked is that the use of the names of these individuals not be used for improper purposes.

493 Now, the Union has rather vociferously contended there is nothing on the seniority rosters but the names of people.

I think we are not so naive as to believe, if you want to find the address, you can use the telephone book; but more important in my judgment, Your Honor, is this, that we are merely asking that the names not be used for an improper purpose. This is not a question of not furnishing the names but merely that the Union be required to do only, what they say they are going to do anyway, namely, not misuse the information.

We believe that for this reason it is both reasonable and a necessary provision to insure that the employees are

not, because of providing of these lists, subjected to undue harrassment.

Now, the Union Shop question we have offered, Your Honor, to prove the discrimination that has occurred against previous members. We have offered the application for membership since the hearing in May. We have offered to show the failure of the Unions to provide membership application forms. We have offered to show that, even where

494 this information requested in the form of a questionnaire was given, there was still no membership application form or membership being forthcoming; that the only instance in which the application form had been supplied was by the IAM and when this was submitted, the individual was not admitted to membership.

Now, we again believe, Your Honor, that this is related to the conditions under which the Defendant is operating.

We further believe that this is intended, in the opinion of the Fifth Circuit Court of Appeals in the Trainmen case, to be a matter which should be disposed of by provision making the Union Shop Agreement non-enforceable as to these new employees with respect to whom the discrimination clearly has been demonstrated, unless and until the Union in question is willing to offer membership to these new employees.

We believe that this is a proper part of the request which we have made and does relate to the conditions under which the Carrier must operate. And as we have asserted before, this is not only a matter which relates to the rights of these employees but it is a matter which directly affects the monetary liability of the Carrier itself, for the

495 reason that the Unions have already demonstrated that the approach will be to assert and to contend that these employees must be discharged because of the failure to make an application within a specified time after employment. And on this basis that the Carrier may be subjected to severe monetary claims which, even if we win all of them, we will certainly be put to the expense of de-

fending before the Adjustment Board, and that, because of this, we feel that this is a reasonable portion of the Order to clarify at this time to prevent these disputes arising in the future.

In summary, Your Honor, because of the necessity for decreasing the service that we can provide to the public unless we are permitted in the limited instances involved in this request to continue to use employees across craft lines and seniority districts and to use supervisory personnel to perform certain work which they and they alone are qualified to perform, to continue to hire people with such qualifications as we can obtain and placing them into the training program into whatever slot their experience would

496 warrant their being placed and advancing them upon completion of the additional experience with the Railroad through the training program until they obtain the journeyman position and the concession which all parties have agreed to that the apprentice ratio and the age limitation should not be applicable during this period of strike conditions since we are unable to get fully qualified craft people; and the bridge tending, we believe, because it is totally critical to the operation of the Defendant, that we should be permitted as part of the over-all security to continue the present method of performing this work by supervisors or by contracting it out to security guards; and, finally, with respect to the seniority rosters and the Union Shop, that we be required to furnish the seniority rosters only for legitimate purposes and that the Order specify that those rosters not be used for any improper purpose, and that the Union security agreement be inoperable until such time as the Union which wishes to enforce it demonstrates that membership is available to the class of employees hired since the strike without discrimination.

The Court: Do you think that—does the bridge tender, your request with respect to bridge tenders, come  
497 under No. 6 or No. 7, or both?

Mr. Devaney: It comes under No. 6, Your Honor, not under No. 7.

The Court: Well, what is it you want? Specifically what is it you want me to authorize under No. 7?

Mr. Devaney: Under No. 7, what we have asked and all that we ask under No. 7 is that there be an Order requiring the Defendant to supply the seniority rosters and that the Order—

The Court: 8 is seniority rosters.

7 is called "Security" in your Application, and you say that you have had to institute and maintain various security measures,—

Mr. Devaney: Well—

The Court: —to protect plant equipment and property; that the only portion of the work covered by any agreement is the work of bridge tenders. That's why I ask you if bridge tenders—

498 Mr. Devaney: Your Honor, I don't know which—perhaps we are reading something different. I'm reading the Application, on page 3, and No. 7 relates—

The Court: Oh well, I—

Mr. Devaney: It says, "Defendant"—

The Court: I did. I turned to Mr. Wyckoff's affidavit instead. It was the wrong thing. They are all in here. He divides it into nine points and the Application divides it into eight. I'm sorry.

Mr. Devaney: And the Application which I was referring to—

The Court: 6 is the bridge tenders.

Mr. Devaney: That's correct. And 7, all we are asking and all we have said—

The Court: 7 is the seniority rosters, and 8 is the Union Shop provision.

499 Mr. Devaney: That is correct, Your Honor.

The Court: All right.

I think, Gentlemen, before I hear from you, if you don't mind, I would like to break off a few minutes. Take about ten minutes.

(Short recess)

**Argument By Mr. Shapiro**

Mr. Shapiro: May it please the Court.

This is an extraordinary Application for relief from the terms of the Injunction which was issued in this proceeding on October 30, 1964. It is extraordinary because it asks that the Carrier be excused from the express requirements of the statute, which says without qualification that Carriers cannot change rates of pay, rules and working conditions as embodied in agreements except as provided in those agreements or as in Section 6 of the Act.

Now, there is no exception in the Act for strike conditions. We think Congress knew what it was doing  
500 when it enacted the statute, that it put that in well aware of the fact that labor disputes do sometimes culminate in strikes. And we also think that collective bargaining agreements are negotiated with this background in mind.

Now, there is no exception for strike conditions either in the statute or in the collective bargaining agreements with which we are concerned here.

The Court of Appeals in the *Brotherhood of Railroad Trainmen v. Florida East Coast Railway* has found such an exception.

The United States doesn't agree that that exception is there and we wish to preserve the position that the statute should be applied as it was written.

However, the exception, as found by the Fifth Circuit, governs this Application. Now, this is as we stated in the opening statement a very narrow exception. And the agreements govern except to the extent that this Court may authorize departures on a select item-by-item basis and on a convincing showing that the departures are reasonably necessary to effectuate the Carrier's right of self-help.

Now, this showing has to be based on the totality  
501 of the circumstances surrounding the dispute and the Carrier's position vis-a-vis the Union's.

I think that on this Application it is clear that the relevant proof falls into two categories. The general consideration relating to the history of the dispute was shown in the prior proceedings in this case and the prior proceedings before this Court of which it can take notice, and particular considerations relating to the item-by-item requests.

I would like to turn first to the general considerations:

I think the history of this dispute makes it clear that this Carrier is not coming into Court with clean hands. Since this controversy began, the Florida East Coast Railway Company has been found to have violated the Railway Labor Act, in one case in the District of Columbia, *United States v. Florida East Coast Railway Company*; in the instant case, in *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, and *Brotherhood of Locomotive Engineers v. Florida East Coast Railway Company*. It has also been found by this Court to have violated Public Law 88-108, the Emergency Arbitration Statute.

When the injunctions were issued last April,  
502 1963, in *United States v. Florida East Coast Railway Company*, and in this Court's decision last December in *United States v. Florida East Coast Railway Company*, the Carrier did not comply. It made no effort to operate under the requirements of the statute. In fact, the Court of Appeals has said in the *Brotherhood of Railroad Trainmen* case that it has conducted itself with no pretense at compliance with the Railway Labor Act.

Until last Spring, it operated under so-called "Temporary Conditions of Employment" with a work force that it had recruited and manned on the Carrier's property without regard to the requirements of the law.

Now finally, having been brought to a point where it is ordered to comply with the law, it asks that the heart of the Order directing it to do so be cut out for its operating convenience.

At the present time, this Carrier is operating at approximately the same level that it operated prior to the strike.



Mr. Thornton has testified that it is moving 4800 cars a week and that this is about equivalent to the same season two years ago.

Now, it has achieved this level up to now by  
503 operating illegally. The work force that it has acquired to do this has, the testimony shows, been at a level of about 400 non-operating employees for the last year, approximately, possibly some slight fluctuation. It reached that level under the illegal "Conditions of Employment".

Now, in the light of the Carrier's over-all operation and its much reduced staff, it is obvious that this strike up to now has been a tremendous boon to it, and I think this is probably why the most conspicuous omission from the proof has been any comparative figure on operating revenues.

The Carrier runs no passenger service. It carries less than car-load freight, at its convenience; although apparently this has recently been a profitable enterprise because it seems to be carrying a good bit of it. It has the cream of the business and less than half its former work force.

Now, I think, as far as this Carrier is concerned, that the strike can go on forever and it would not be in the least disturbed.

Now, I think nothing in the Court of Appeals' decision in *BRT v. FEC* implies that a Carrier's right to self-  
504 help guarantees this kind of a windfall or guarantees that there will be an absolute return to pre-strike conditions. The ultimate object of the Railway Labor Act, as expressed in Section 2, First and 2, Second, is to bring about every reasonable effort on the part of the Carriers and employees to make and maintain agreements and to settle disputes and to do this by collective bargaining.

So, when the decision of the Fifth Circuit is applied, it has to be applied in the light and the spirit of the Act. And that spirit is that controversies are to be as narrow as possible.

Now, the proof shows us that FEC's estimate of any injury to its operation must be taken with a great deal of

salt. Last May, the issue came up in this proceeding and we were told, that if FEC had to comply with its collective bargaining agreements, the work force would have to be increased by 600 employees or service would drop 50%.

Now, this testimony was by the Carrier's Vice President in charge of personnel and it was buttressed by the testimony of the Carrier's President.

Now we are told that there was an error of about 480 employees in that estimate and that the true facts  
505 are that FEC will have to reduce their service some 30 to 50% unless it can find somewhere 122, not 600, new employees.

Last May we were told, without qualification, that the Carrier didn't take less than car-load lots. Now we are told that it has been taking them for about a year and been doing it on a permit basis; and that at the present time it's carrying more less-than-carload on a permit basis than most of the railroads in the country.

Now, these discrepancies are explained in part by new operating methods, new machines; but the testimony of Mr. Davidson and Mr. Webb and Mr. Hales, taken as a whole, indicate that many of these marvelous improvements in operating methods had been in effect prior to May; that FEC, subsequent to May, has put a great many more of them into effect and that it will continue to do so in the future, but thus it will cut its work force and it should be able to get along with the collective bargaining agreements.

Now, these changes can be expected to continue. The Carrier has shown itself to be resourceful and imaginative in its managerial techniques when it operates illegally;  
506 and we can expect the same resources and imagination to be applied should it be directed to comply with the law.

It has closed many facilities unnecessary to it, particularly in light of its present operation which is exclusively freight. And over-all, it's pretty clear that these wonderful machines that Mr. Davidson, Mr. Webb and Mr. Hales

described at some length, the improved operating techniques, show that it certainly doesn't need to expect a drop of 30 to 50% immediately by being required to comply with the collective bargaining agreements.

Now, many of the demands that it has made for being excused from the agreements result not from the strike but from purely managerial decisions in relation to the strike. For example, in the Signals and Communications Department, there's new equipment there which cannot be operated either by the former employees or apparently by the present employees, according to Mr. Webb's testimony and his affidavit.

Now, the installation of this new equipment is not a reason, I think, to excuse the Carrier from the obligations of the collective bargaining agreements on the ground of strike conditions; and that's all we are concerned with here.

507 Now, some of the Carrier's staff difficulties come from other factors. For instance, its recruiting methods have to be considered. The testimony is that the Carrier relies on informal recruiting methods to obtain its employees. It doesn't advertise; it doesn't have agents out; the heads of departments call around, visit around; the Director of Personnel calls around and visits around. Yet we are offered an exhibit purporting to show its difficulties in recruiting personnel.

Last May, Mr. Wyckoff told us it would take some eighteen months to reach the requirements of the collective bargaining agreements. Mr. Hales told us that for his department it would take some eight months to recruit, using whatever his present methods are, a full force and four months to get about half of that force.

Now, these are factors which relate to the way the Carrier tries to get people. The figures that it shows in Exhibit II on the number of applicants are in part reflected by its recruiting methods.

Now, Exhibit II is interesting because it shows something

else about the turnover in this Carrier. The Carrier's total hiring in 1963 and ten months of 1964 was 850 employees against an average force of about 400.

Something is happening on this Carrier which causes people to leave it. And this too is a factor not to be attributed, I think, just to the strike.

Now, the Carrier's recruiting problems also can be attributed to its own selective standards. I think we were told in the course of this proceeding that they are not much different and perhaps a little lower than the pre-strike standards for some jobs, and yet, in October of 1963, before the Federal Board of Inquiry, which was read into the record in this case, in the transcript at page 235, Mr. Thornton described their personnel program in great detail and, while I don't read the full text of what's already in the record—

The Court: Well, the high spots anyhow, I would like to have brought back to my mind.

Mr. Shapiro: All right. Well, it's actually pages 234 and 235 of the transcript of last May. Mr. Thornton testified that he would like to tell the Federal Board of Inquiry about the man-power requirements and he talked about making plans for recruiting personnel, and then went on:

"To do this, we are very proud of the qualifications we have established for these new personnel. We have as of this time, in excess of 650 employees on the Railroad whom we have recruited or who have actually returned to work since the work stoppage. Now, these employees are being very closely screened. We are screening them from the aspect of their personal references. We are screening them through our special services department as to any criminal record they may have, screening them as to any educational requirement. We are now employing only people with high school education with lessons in lab class, whereas before they had grammar school. We are screening them as far as physical requirements are concerned.

We have instituted a very thorough physical examination and have included back Xrays. I make the comment  
 510 that we have been selective in our requirements. Of the 650 we have now, I would give you this as a conclusion. I can't give it to you exactly but I would imagine we have over 1000 applicants we considered for employment and we have gone into a good long-range program from the standpoint of employment capabilities."

So that was the story in October and that was the story last May. So part of their recruiting difficulties may come from their own standards and techniques, standards and techniques which may be legitimate in the proper context, but they are not a ground for saying that they should be excused from the collective bargaining agreements because of it.

Now, I think this Carrier is continuing to show its proclivity for being devious with the Courts. For example, the Government has stated that it has no objection to the Carrier's Request No. 3 to be excused from the apprenticeship requirements. Now, those requirements relate to age restrictions on who can be hired as an apprentice and—

511 The Court: Ratios.

Mr. Shapiro: —the ratios of apprentices.

The Court: Yes, sir.

Mr. Shapiro: Now, that's all that we intend to consent to. Yet we have a situation where, according to the testimony, the Carrier unilaterally decides when an apprentice meets the requirements for journeyman, notwithstanding the provisions of the agreements.

Now, the agreement, I think, is pretty plain when it's read as a whole. We pursued this a little bit with Messrs. Cooke and Wyckoff primarily to lay out the position of the parties, not to argue the matter through witnesses, but the special rules governing the various mechanics crafts in the agreement for the System Federation 69, the so-called Shop Craft Agreement, Exhibit 4C, requires four-years

experience or an apprenticeship, and the experience is experience in the industry. If this were not so, the supplements part in the agreement dealing with the hiring of temporary employees would—and containing such  
 512 provision as—well, the indenture provision itself wouldn't be in there. These are to restrict the journeymen craft to people in the railroad industry.

Now, we mention this simply because we want to make clear that, in consenting to No. 3 in the Application, we don't intend to waive anybody's rights under these agreements or to suggest that the Carrier can go beyond the strict terms of Item 3.

When the Carrier has found it to its interest to read these agreements strictissimi juris, it hasn't hesitated to do so, as was demonstrated in the testimony concerning the dismissal of the dining car employees and others.

Now, these have been some general considerations but they are very relevant to the type of relief to be given. Because the Carrier has demonstrated an extraordinary ability to resort to self-help by illegal means, we think it ought to be given a fair opportunity to try operating by legal methods, at least for a little while it ought to try. So we would suggest that in any Order of any kind authorizing departures from the agreement, there has to be some kind of restriction.

513 The most reasonable Order, I think, would be one which directs the Carrier to comply with the terms of the agreements and if, after a reasonable time, an operating quarter or two operating quarters, it has specifically had difficulty after having made an honest effort, then those difficulties can be considered. The Carrier has no experience in trying to comply with the agreements since the strike began, because it only brought itself into compliance three weeks ago.

Now, this brings us to the specific items as to which the Carrier has addressed itself. These can be best said in terms of Exhibit BB. They are directed to the specific departments.

In the Mechanical Department, the Carrier contends that it needs something over 52 new employees in order to comply with the agreements and that it has to cross craft and class lines and seniority restrictions in order to achieve this result.

Well, we know that the Carrier has reduced its requirements by 82 employees through various managerial improvements, some of which apparently were discovered because of the strike.

Now, if the strike, according to Mr. Hales' testimony, is a partly contributing factor to improved managerial techniques, would permit reduction of requirements, I think that complying with the collective bargaining agreement would be an even greater incentive in the Mechanical Department.

In the Maintenance of Way Department, I don't think there is any serious problem. There's only one gang involved.

In the Communications and Signals Department, it's largely a matter of a few employees and part of the problem in the Communications and Signals Department is that they have new equipment which is not operable either by the former employees or by the present employees, so this just isn't a ground for excuse.

In the Transportation Department, it's a question of craft line and seniority district. I think they are short one dispatcher. Again, the discrepancy, the lack of personnel, is not so gross as to lead us to believe that the Carrier would automatically suffer this 30 to 50% reduction that it fears. It may suffer some reduction. I don't doubt that it will for a time, but it can recover.

The same is true for the Accounting Department and the Freight Department. There is no problem in the Personnel Department. I don't think there's a real problem in the Stores Department; that that was conceded.



In the Personnel Department, it's a matter of one employee and that employee is a requirement that—or occupies a position, a requirement for which was established after the strike began. I don't think that there is any problem with the Personnel Department.

Now, what are some of the techniques the Carrier can use without going into a violation of the agreements?

Well, additional overtime is one. Apparently, in the five months between May and this hearing, a great many wonderful machines were discovered and put into operation. I'm sure there are more machines that can be found and operated. I think Mr. Davidson's testimony about the success they've had, both before last May and after last May, with new machinery demonstrates the possibilities in such a difficult area as Maintenance of Way.

Now, I think the same thing can be achieved in other areas. The Accounting Department, for example, 516 the Freight Traffic Department. These things may increase the Carrier's costs slightly but costs is not the primary consideration.

Now, the Government has raised no objection to the Carrier's request pertaining to bridge tenders. I must say that, after hearing some of the testimony dealing with this, I was a little puzzled as to why the Carrier could not make proper security arrangements for its bridges and still have an employee who complies with the collective bargaining agreement. If they need guards, they can put him beside him. If they need someone with unusual character and background, they can investigate their character and background before they hire them, a special investigation. They have such a program apparently and it can certainly be applied.

Items 7 and 8, dealing, respectively, with seniority lists and suspension of the Union Shop Agreement, simply have nothing to do with the Carrier's operating requirements.

The Unions who are on strike anticipate that some day

the strike will end and that they will be able to adjust their seniority rights at that time. They have to protect the rights of their employees who are presently striking. I see no reason for this unusual secrecy. If there is harassment or abuse, there are legal procedures available to punish those who engage in the harassment or abuse, and there is no need for amending the Decree of this Court, which is what they have asked for, to condition complying with the law on its not being violated.

Section 8 of the Union Shop Agreement really deals with—the request for excuse from the requirements of the Union Shop Agreement seems to deal primarily with the fear of future claims arising out of it. Now, if there is any problem on that, that can be raised in an appropriate forum, the Adjustment Board. The law is clear on what the obligations of both the Union and the Railway are. If the Union violates its obligation, there is a proper remedy for that violation.

Now, if they are granted authority to depart from these agreements, that should be conditioned for a reasonable period of time only. Otherwise, they become a permanent part of the strike situation and, frankly, this strike and all of the complex labor disputes which are related to it are not going to be solved, are never going to be solved if the Carrier is able to simply disregard the requirements under which the controversy is supposed to be conducted. Congress put the restriction in Section 2, Seventh for a purpose, I believe, and that purpose is to confine the area of conflict. That's one of the reasons why, assuming that exceptions can be authorized by the Courts, those exceptions have to be very narrow, very closely confined, so that the dispute doesn't, as it has up to now because of the carrier's illegal conduct, go completely out of control and show no prospects for an end ever.

Thank you, Your Honor.

Mr. Milledge: May it please the Court.

The Court: Mr. Milledge.

Argument by Mr. Milledge

Mr. Milledge: The position of the Intervenor is essentially the position of the Government.

The request before the Court is a request not for permanent changes in the contracts, of course, but for  
 519 temporary changes, for temporary exceptions to meet a particular situation; so that in the concession made by the Intervenor on Item No. 3, it's of course clear that this is not a concession of contract change but simply a concession as a temporary matter that apprentices may be hired who are over the age of 23, and that there may be more than one apprentice for each five journeymen, in light of the contract which requires journeymen to have at least four years of railroad experience, which we concede is not available—that type of experience is not available to the Railroad at this time.

The request of the Railroad here is not a request under the opinion of the Court of Appeals. It is not an item-by-item approach. It is simply a blanket request for relief. Such a request for relief might have been appropriate in the first few months after the strike started when there was a great deal of fluctuation and experimentation and change; but here we have the situation in which the Railroad asserts that it has 80% of its necessary man power to operate under the contracts and has had this during this  
 past year.

520 The broad brush picture presented is that the Railroad has been continuously trying to increase its work force, but I think that is belied by the statistics and by what the Railroad has said in the past.

They increased their force from zero to approximately the present number, 400, during 1963. Now, they didn't show us any charts on that, an interesting omission, but the testimony of Mr. Wyckoff was that the present number of

non-op employees has been essentially the same during 1964.

Now, this is consistent with what their position was in another forum, that is, the Defense Inquiry Board. And Mr. Shapiro has read from a part of that but I think there's one other sentence of Mr. Thornton that is significant, and that is the sentence in which he says:

"I think we are approaching the point now where we are almost up to full man-power requirements."

That was October 1, 1963.

The reason that there has been no increase in the work force during this past year is that, we submit, a purely economic one; it is not as they have portrayed it, 521 that they have fine employment arrangement but they can't get the people. It's rather that they have had enough people to suit them, and now they have to abide by the contracts.

Now, it would seem to me—we don't have the exact statistics, but, in the nine months of '63, they increased their work force from essentially zero to 400 in about nine months. Now we have a situation in which they may have to increase their work force approximately 20%.

It would seem—I think the evidence is such that the reasonable inference would be that, if they must abide by the contracts, they can increase their work force to comply with the contracts in a very short time.

Now, by cross-examination, we attempted to deal with what we construe to be the situation presented by the Court of Appeals' opinion in the Trainmen case. It is conceivable that, even after a year and a half, there might be some highly technical personnel that the Railroad has some deficiency in, some specific item-by-item deficiency. And there have been, we did get down to a few specifics but that's about all.

522 In the Maintenance of Way, we found that they have only one bridge gang and they would like to be able, on a brief temporary basis, to contract out

to another bridge gang; so we did get to one specific there.

There was some discussion of the CTC as a contract matter. There is a lack of one train dispatcher, for which a supervisor is presently being supplied, and Mr. Wyckoff is short an accountant in his office. But other than that, we don't have any specifics. It's just a general desire on their part to avoid the contract and to avoid it as long as possible.

We would suggest that—well, one other thing I think should be pointed out: That the Court of Appeals here, the decision came down on August 18 of this year, the hearing in this case was in May. There has been no evidence of any effort from May to August or, specifically, for the last three months, from August up to the present time, to come into a position where they were able to completely comply with the collective bargaining agreements without any reduction in service.

The employment level has stayed the same continuously.

523 Now, just one other thing about these documents, particularly BB and II. They are, of course, selective information but it would seem that there is something unexplained. The three department heads, Mr. Hales, Mr. Webb and Mr. Davidson, who spoke with some particular knowledge of their departments, showed that their departments increased to nearly present levels by the early part of the year, but those departments have shown, in the figures given to the Court, some slow increase during this year; and yet we have the figure given that, as a whole, there were only 390 non-op employees on November 2nd, 1964 and Mr. Wyckoff testified in May that there were approximately 400, so apparently some other departments, they have actually reduced forces, which I think tends also to undercut any characterization of some drastic consequences if the Railroad is required to abide by the contract.

We would suggest that there has been some showing as to a few specifics, such as the one train dispatcher, the

accountant, the bridge gang, and the CTC, and that on a temporary basis, perhaps one or two months, that these positions be permitted to be filled by the supervisors  
 524 or the work presently contracted out be completed but, other than that, there has been no showing along the lines suggested by the Court of Appeals when it entered its Order and made its decision and created this exception in the law.

The Court of Appeals characterized Your Honor's position as being in the engineer's seat, but Your Honor hasn't had any specifics presented to him, to the Court, other than in these very isolated instances which would permit Your Honor to make any, other than these specific exceptions, and certainly they should be on a temporary basis.

Now, so that is our suggestion: That if there has been any showing at all, it is one or two isolated instances which would be in line with the Court of Appeals' Opinion.

#### Rebuttal Argument by Mr. Devaney

Mr. Devaney: Your Honor, I will be very brief.

Let me say at the outset that we have here the same basic contentions that have been made over and over concerning the clean hands of the Florida East Coast.  
 525 Now, I don't think that it would serve the purpose of making an appropriate decision here to go into any great detail.

Let me say this, so that it may be clear as to what the facts are: That when Florida East Coast gave the Notice in April of 1963 that it was putting into effect and operation the work rules as to operating unions, these were not the non-operating unions but were operating unions, it did so before there was any appointment or creation of an Emergency Board, and it followed the decision of the United States Supreme Court that the parties were free to resort to self-help, subject only to the possible appointment of an Emergency Board.

Now, when the Board was appointed, it was appointed to consider the dispute in the matter with which the Southeastern and Eastern and Western Carriers Conference Committees were involved.

Now, prior to this by some period of time, Florida East Coast had withdrawn and given notice to everyone. Now, we had given the notice before this Board was created and at a time when we had every right to put those into effect.

Now, the fact that the Court decided that, because  
526 we had not given the notice of withdrawal to the Mediation Board, we couldn't withdraw without hav-

ing done so, or that the Mediation Board was entitled to rely on our still being a part of this because the Mediation Board had not been given the notice of our withdrawal, does not mean that we acted without a complete legal justification for our position.

Now, Number 2: The action that was brought pursuant to Public Law 88-108, now this was a matter in which it was first contended that we had no right to give an additional Section 6 Notice. Now, they abandoned that position pretty much and conceded that, yes, we could give the Section 6 Notice but we couldn't put it into effect.

Now, the dispute, which was a bona fide and honest dispute, was whether the Notice that we had given in 1963 did include the Notice that had been given in '59.

Now, again, this was not an attempt to avoid the provisions of the Act at all, but was based on the belief that we had the right to give the Notice that we gave.

And what happened when the Notice was given?

Mr. Shapiro said that we have made no pretense  
527 of complying with the Railway Labor Act.

Let me say that we have done far more than attempt to comply with the Railway Labor Act. We have made every effort we can to comply and we did, in accordance with that Notice.

Now, in response to the Notice, the Unions declined to bargain. Now, it is true that the dispute there was over



the presence of the Reporter in part but, again, Your Honor, this was a question of the Unions, I think as they have subsequently indicated, that they did not intend to bargain with us anyway until the matter was settled on a national basis and that, therefore, it's clear that their refusal was simply a bit of window dressing to justify what they did.

Now, we come down to this case:

Clean hands? Well, we might have quibbled when the Order was entered. We might have come in and asked Your Honor to please free us from putting these wage rates into effect. But we have not done any such thing. We complied with your Order fully and completely and we have put those wage rates, we put all of the conditions into effect that we could and we did so on November 13.

528 Now, we have attempted, to the extent of our ability, to comply with the Order of this Court.

Now, why? What's left that we can't?

As we have said from the time the strike began, we have hired people as rapidly as we could.

Now, when Mr. Milledge and Mr. Shapiro stand before this Court and say that there are no records and no evidence to indicate that we have continued this process of hiring, they certainly are ignoring the uncontradicted evidence and testimony in this record. And I would only direct the Court to Defendant's Exhibit II, which shows that in the year 1964, for the first ten months, that Florida East Coast hired 308, Your Honor.

Now, when they say that the number was essentially the same without change, they ignore the fact that 308 people, non-operating employees, were hired in the calendar year 1964, for the first ten months of 1964.

Now, they also ignore the fact that we have had a tremendous drop in applicants.

The Court: Drop in what?

529 Mr. Devaney: In applicants, applicants who have come from our recruiting efforts as well as those who have reported in the office and have sought employment in that manner.

Now, the testimony is perfectly clear that we have never advertised but I don't believe that any Carrier can be required to do more than the Florida East Coast has. It has solicited the only sources of fully qualified people available to us, namely, the railroads. We have solicited all of them that we know about that have seemed to offer productive possibilities, people who might come to work because they were furloughed or laid off from other railroads.

Now, the question of having made—Mr. Shapiro says we don't have agents out, we don't have this out and so forth; this belies the actual facts, Your Honor, that we have in fact hired in the two years more than 850 employees in the non-operating category alone.

Now, we have said here over and over again that the difficulty that we face at this point and the reason that we have made this request to the Court is that virtually all of the people that we have hired since the strike  
 530 began, except the, well, the ones I'm talking about in these exhibits are all new employees, these people are not fully qualified and they are still not fully qualified, Your Honor. And partly in training them and partly in performing the work, this is why we have to continue to use the only people who are fully qualified to complete the rest of the duties that these people are not and have not yet acquired the skill to perform.

Now, they cannot, they are not going to acquire these skills in the next two to three months. We are continuing to train them. We expect to continue to train them. We are hiring. We expect to continue to hire. And this is the most that any Carrier can do under the circumstances. We have continued without diminution the hiring program that we put into effect.

Now, when Mr. Shapiro and Mr. Milledge suggest that there is no explanation on the record as to why this number has remained static, or when Mr. Milledge says that the real reason is that we don't want more, we certainly would not have continued to hire at the rate we have hired

if this were our true intention. We have tried to increase the number of people that we have over-all. We can  
 531 only train so many people at a given time because we have limited number of supervisors.

Now, the assertion that this strike has been a boon to Florida East Coast is again totally fallacious and it is again an attempt on the part of the Government to make evidence without making any effort to introduce any evidence in any proceeding that it's involved in.

Now, as the testimony here has indicated, Your Honor, security alone is costing the Defendant a tremendous amount of money. Mr. Thornton said \$1,000 a day.

We have had locomotives blown up. We have had trains blown up, bridges blown up. And this has represented a tremendous cost to the Railroad.

Now, to come in and say that this has all been gravy to Florida East Coast, therefore Florida East Coast should be punished, is simply, I believe, overlooking the true facts in this matter. And the real truth is that what Mr. Shapiro is saying is "Don't only punish the Florida East Coast but punish the shippers who are using the facilities of the Florida East Coast", because of some—

532 The Court: There are no earnings figures here.

Mr. Devaney: That is correct.

The Court: All that he commented on was the lack of earnings figures.

Mr. Devaney: That is correct, Your Honor. And if he had considered those significant and relevant, he could have asked for them.

The Court: He called it significant.

Mr. Devaney: That's right.

We say that the problem that is presented by this Application is whether there are problems relating to our operation that justify the establishment of reasonable conditions to permit the effectuation of our right to operate during the strike. This is what we have directed our attention to.

Now, if Mr. Shapiro feels that the earnings figures were significant, he could certainly have asked for them.

We are trying to establish what problems we are  
533 faced with in operating the Railroad. That is what we believe we have done by showing to the Court those areas in which we are still not able to comply, without using the supervisors to perform part of this work, without crossing the seniority districts and craft lines, because the people—or, using them in that manner, these are the only people that we have.

We have continued our hiring and training program. We have not stopped it, as Mr. Milledge has made the assertion. And the testimony is uncontradicted that we have not stopped it. And the hiring, the number of people hired in both 1963 and 1964 certainly indicates that we have made every reasonable effort to hire them; 542 people hired in 1963, 308 in 1964.

Now, compare, Your Honor, the number of applicants, 2035 in '63 and only 1122 in the first ten months of '64.

And why? I believe that there can be little doubt that the bombings, the sabotage and other activities, beginning in February, was the direct reason for the tremendous  
drop in the number of applicants. In the month of  
534 February, '64, it went to 51 applicants where there had been 242 in January of '64.

Now, these are part of the problem that we have had to operate under and we try to operate under them the best way we know how, by recruiting and training people as rapidly as we can. This we have done from the beginning. This we are doing now. And when Mr. Shapiro suggests that we have not been doing that or that we could in a short period bring up the number of people, this isn't correct.

Now, he talks about marvelous machines.

Well yes, of course, we have put automatic equipment into the Accounting Department. We have expanded the use of it to areas we had not previously used it. But we

are faced with the problem, Your Honor, not so much in the Maintenance of Way—we have said that the only problem in that Department is what we should do with respect to the bridge gang. Now, we have said that, we brought this up, the practice in the past has always been, there has never been any doubt, that the Carrier has the unquestioned right to contract out any work that it does not have the  
535 equipment or the employees qualified to perform.

Now, this is what we have done but we have brought it up here so that we can avoid being faced with a contention in some later proceeding that, because we hadn't brought it out, we were therefore somehow in contempt of the Order of the Court; but we say, as we have said before, that this is a right that we have always had. It is a right that we have because we do not now have the qualified personnel to perform this work. And this is precisely what has always been done on this Carrier and this is what is done by every other Carrier.

Now, the question of the specific items:

What we have shown, Your Honor, is that you cannot go down item-by-item and say that Supervisors A, B and C must perform five minutes or ten minutes of the day doing scope work, or he must do Operations 1, 2 and 3. The problem is that in training these basically unqualified people we have to use the supervisors to perform some part of this work and, as we continue to hire and train, this is going to be a continuing problem until we have a full staff of fully qualified employees.

536 Now, the use of employees across seniority districts and across craft lines is precisely the same.

Now, have we shown the specific areas in which we need these people and in which the problem exists? And I suggest that we have and, if there is any question or if the Court would desire to see all of the bulletins that were issued, we will certainly be glad to produce them. But the 114 additional people, Your Honor, those are the skills, those are the areas in which we do not have qualified people

and these are the skilled employees that we have not been able to train. We haven't been able to attract from other sources and we have no alternative but to continue to operate in the way that we have been operating or reduce the service.

Now, to say that we might not have to reduce the service, again is to ignore the uncontradicted testimony on this record. 30 to 50% reduction? Why?

Because these people, these supervisors and these employees who are operated across seniority districts or craft lines, are doing work that is essential to the operation  
537 of the Railroad and we cannot continue the level of freight that we now handle unless we can continue to perform this work in the manner we are. Otherwise, it means a reduction.

Now, Mr. Shapiro has suggested that because this estimate back in May, and we made it perfectly clear that it was an estimate and how it was arrived at; that when we now say we only need 114 additional people that we have had this tremendous change since that time. Well, this also isn't entirely true.

Virtually all of the equipment that Mr. Davidson testified about was acquired after May.

The Court: You were hollering wolf in May.

Mr. Devaney: I beg pardon?

The Court: You were just hollering wolf in May.

Mr. Devaney: We weren't hollering wolf in May, Your Honor. We—

The Court: It has to be on the record. But you are  
538 now showing what you actually need.

Mr. Devaney: Your Honor, we said in May that, prior to the strike, we had X-number of employees. We now have Y-number. And that our estimate would be that we would need 600 people.

The Court: That in order to comply, you would have to hire 600 more.

Mr. Devaney: That is correct.

Now, we have since that time acquired—

The Court: When a responsible official of the railroad takes the stand under oath and says, "This is my best estimate"—

Mr. Devaney: That is correct.

The Court: —I don't think he is just pulling the figures out of the sky. If that's all he's doing, you tell me that he was just trifling with the Court in May.

Mr. Devaney: That isn't correct, Your Honor.

539 I'm saying that, since May, we acquired in the Maintenance of Way Department, by way of one example, virtually all of the equipment that Mr. Davidson has testified about that account for 112 people not being required.

Now, the only equipment that was involved prior to that time was the "hi-rail" truck, which we received in December, '63 or January of '64, and which he estimated became fully equipped by March.

Now, by March, we had had some but not much experience with the use of the "hi-rail" truck. Since that time, since May, we have acquired a great deal of additional equipment, which Mr. Davidson identified and testified to, and which was further identified and covered in Mr. Thornton's affidavit. Now, this equipment, Your Honor, has resulted in an over-all decrease in the requirements of this one department of 112 people.

Now, all I am saying is that we have shown and we have—one of the purposes of breaking down the requirements and reduction of requirements department by department was to show why we did not need as many people as we had originally believed we might need.

540 Now, the change in methods, the change in technique, has continued in every department since the time we were here in May; and the statement that we have not done anything since the decision was ordered is also not true.



We have gone back and, to be very frank about this, Your Honor, we have some supervisors who had never previously operated under the prior agreement with any one of these Unions; so that there has been some problem of their finding out completely what the provisions of the agreement would require and necessitate from the standpoint of man power.

Now, on this basis, we are saying that the 114 people—now, the job descriptions of many of those positions have already been read into the record, and it clearly demonstrates and we will be glad to submit the remainder if the Court would desire to have them, but it clearly demonstrates, Your Honor, the kind of work that we cannot provide because we don't have these skilled people available to us.

Now, one suggestion was made by Mr. Shapiro as to what we might do. He said, "Well, one thing they  
541 can do is they can work more overtime."

Well, this was raised specifically in the testimony, Your Honor, and there isn't any doubt that it was uncontradicted in any way that if a person is not qualified to do the job in eight hours, he isn't going to be any more qualified to do the job if he works twelve hours. The problem is that, where these people are not qualified to do the work, somebody else has to do it instead of the unqualified person. This is the problem that we have.

Now, we are not solving the problem by working the qualified person, who is the supervisor, overtime. This is no solution. Our problem, and the only reason we have a problem, is that the only way we can perform the work is to use that supervisor to perform the work he's the only qualified person to perform it.

Now, it has also been suggested by Mr. Shapiro that, on the question of the Union Shop on future claims, he says, "Well, the Railroad can go to the Adjustment Board."

Now, this is an interesting comment, because he seems to be saying that when something affects the Railroad we

ought to go to the Adjustment Board, but when it  
542 affects the Union the Court ought to decide it.

Now, I merely suggest that what is to be applied to one must be applied to the other. And we are saying that this is an area that subjects us to future claims because of the interpretation of the Union Shop provision, and we believe that there should be a provision saying whether or not the Union Shop provision is now to be enforced or whether it should be held in abeyance, as we believe the Fifth Circuit has decreed, unless and until they have offered membership to the present employees.

Now, Mr. Shapiro also said that well now, we ought to have a fair opportunity to operate legally and then, if we have trouble, come back in.

I think this is a little bit like saying that, "Well, let's cut off Florida East Coast's head and, if it hurts, it can come back in and ask for relief."

The only trouble is that, when this happens, the patient dies.

Now, what we say here, Your Honor, and there has been nothing suggested contrary to the evidence and testimony offered here, and that is that we can operate and provide

the level of service we are now providing only if we  
543 continue to use supervisors in the manner that we have had to use them to perform the part of the work for which they only are qualified to perform, and to cross the seniority districts and the craft lines.

We have said and there is no question whatever on the record that if we cannot do that, it will mean an immediate reduction of 30 to 50%.

Now, to say that there are only these isolated areas in which we would have some impact is simply not correct. In every one of the departments—and if I may refer you to Defendant's Exhibit BB—if you take the departments department-by-department, the Mechanical Department involves 52 additional jobs which we need. Now, without those 52 jobs, Your Honor, that work can only be per-

formed by using supervisors, whether they be exempt or non-exempt supervisors or by people who are not fully qualified with respect to whom part of the work must be done by the supervisory personnel; or we must use people across craft and seniority lines. Now, there's no other way we can operate the Mechanical Department without those 52 people, unless we do that.

And it goes through every one of the departments  
544 involving a total of 114 jobs.

Now, it is true that we have not gone through and high-lighted every individual one of the 114 jobs, but we have illustrated the impact that those jobs would have, including such jobs as the dispatcher.

Why does the dispatcher have the impact? Well, if we don't have the dispatcher for whatever period his services are not covered, the Railroad simply cannot operate.

And so we got through every one of the 114 jobs that are critical to our operation. And every one of the 114 jobs is now being performed in some manner. And the only way we have of performing it is with supervisors or by crossing the craft lines or seniority districts.

Now, to say that this would not have the immediate impact that we have shown that it would is not being realistic and it's ignoring completely the uncontradicted testimony and evidence on this record.

And I submit finally, Your Honor, that the real purpose of this suit is to bring about, by using the Court as  
545 the means of terminating or reducing the operation of the Railroad, which the strike itself has not accomplished in as desirable a manner as the Unions have sought to accomplish.

Thank you very much, Your Honor.

The Court: I think the Government ought to have a right to reply to that last statement. I'll just tell you that I'll throw it out the window and you don't have to reply to it. It will save some time. We can spend a good many profitless hours, I think, arguing over why the Government brought this suit.

Is there anything else you want to say?

Mr. Devaney: Your Honor, there is just one other thing: As you have indicated I might, I will supply a copy of the agreement that I referred to. And I wonder if I might inquire—the total agreement, the agreement of August 21, 1954, is 14 pages in length; there are only two pages that deal with the establishment of the rule to amend existing rule as to time limit in presenting and progressing claims or grievances. Now, it would be my suggestion, Your

Honor, that only that part—

546 The Court: Well, I think you might agree with

Mr. Shapiro and Mr. Milledge how much of this should be put in, mimeographed and supplied or Xeroxed and supplied, however you want to do it.

Mr. Shapiro: Only the relevant portion.

Mr. Milledge: It is only 14 pages and it is an agreement that, if it isn't already in the record, it is a part of something else and—

The Court: I thought it was 50-odd pages.

Mr. Milledge: No.

Mr. Devaney: I don't believe it is, Your Honor, the particular one. There are a whole series of them but I believe that particular one is only 14 pages from the beginning of it over to the signature page.

The Court: Well, that doesn't seem to me a very arduous chore. You were asked to supply it; go on and put it in.

Mr. Devaney: Very well.

547 The Court: Gentlemen, I expect to deny this application in most particulars. There are certain fields where limited permission to deviate should be granted. There is no question but what there may be this limited, the age and apprentice ratio under No. 3, that that should be permitted. Nobody questions that.

Under No. 6, it would seem to me that for a limited period and I would say three months, that you may continue to use supervisors or contract personnel for bridge tenders,

that you may make application for a further extension of that at the end of the three months or before the three months expires.

As to No. 2, permitting supervisors to perform craft work so long as the defendant doesn't have sufficient personnel, I want to—well, starting with No. 1, No. 1 will be denied, the right to cross craft or seniority district restrictions.

As to No 2, I think you should be permitted to fill one dispatcher's job with a supervisor for a limited period and I would say three months there and let you, if you haven't been able to recruit this additional dispatcher, and under No. 2, frankly, I want to review this matter and see if there may not be other specific exceptions which should be granted.

548 No. 4, there may be specific examples that we would have to make a similar exception to the exception made under No. 2.

Under No. 5, I think it perhaps should be spelled out and made clear that contracting out to the extent and in the areas that contracting out is now going on may continue, but that there should be an additional application if further deviation is contemplated. That's specifically in this bridge construction or bridge repair field where you've got this one contract gang as I understand it now working out here between Bowden and Bayard in the swamp out there.

Mr. Devaney: That is correct, Your Honor, and also the CTC installation.

The Court: Yes, sir; well, I think the CTC is the same thing.

6, I've covered. 7 would be denied. I've heard this thing I don't know how many times. There is a tendency for these things to sorta run together in your mind but I've heard this thing about the grave consequences to follow the furnishing of seniority rosters and extra board lists and that sort of thing several times and maybe it's

a deficiency with me, I don't know, but I haven't  
 549 yet caught any significance to it and I don't think  
 any showing has been made here. That will be denied and I'm clearly of the view that No. 8, the Union Shop matter is not the type of exception that should be raised here and No. 8 will be denied. I will try to work out an order in a reasonably short period of time to formalize what I said here and to pick up these areas where I've indicated there perhaps should be further specific deviations permitted.

I hope that this announcement will permit the defendant to go ahead and get in compliance in the respects I have indicated and I hope further that the ones that I've left open to be covered by the order, that there will be no further insistence by the Government or by the Intervenor that there be a compliance until that is actually spelled out. In other words, do you see what I mean, that—

Mr. Milledge: Yes, sir, but—

The Court: Until I've told them under these limited categories where they may deviate, why let the matter remain as it is.

Mr. Milledge: And that's of course in the area of  
 550 supervisors?

The Court: That's right.

Mr. Milledge: Yes, and the only area which could be open to doubt is some area which have been specifically referred to here?

The Court: That's right. I don't conceive what I'm told to do in the other case, which is the authority for permitting a deviation because of strike conditions, I don't consider that I'm told to do anything more than on an item by item showing of strike caused conditions to permit deviations. I don't think that I'm given a mandate, because it's shown that a supervisor has to perform scope duties in one particular place with regard to one particular job or work, that that is an excuse to just wipe out the injunction all over the rest of it. That just isn't the sense of the thing.

At any rate, I'll try to give you an order within the next few days.

Mr. Shapiro: Will Your Honor require any submission of a stay order at this time or shall we just treat it like—

The Court: I hope that what I said before will  
551 take care of the stay informally until an order can be entered, if I have the assurance of counsel.

Mr. Shapiro: The Government will agree to that.

The Court: I hope it's manifested to the defendant and the defendant's counsel in these areas where I've indicated that an order, that the request for the right to deviate or not adhere, in those areas, that they will proceed immediately to get in compliance.

Mr. Devaney: Your Honor, may I make this request.

The Court: I think I know what it is and I think the answer is no, but go ahead.

Mr. Devaney: As I understand your ruling, you are denying the right to continue to use employees across craft lines?

The Court: Yes, sir.

Mr. Devaney: And across seniority districts.

The Court: Well, I don't—if you want Mr. Sheridan to type up what I said there, he can give it to you. I  
552 don't want to go back down this list now.

Mr. Devaney: No, I don't intend to, Your Honor, but what I wanted to point up is this: Until we—we have already to the extent that we can, Your Honor, complied with the order not to cross craft lines and not to cross seniority districts, and without reducing the service, we cannot comply fully. Now, what the overall effect on the operation is going to be, we cannot determine until we have the final version of your order. I merely request—

The Court: Let's say this then, I'll give you an order by tomorrow and you can wait until tomorrow to come into compliance.

Mr. Devaney: Could we, while we are at it, could we say that there would be at least a two or three day period



after the order is issued so that if it appears, No. 1, what I would like is an opportunity, Your Honor, to see what the order in its final form will mean as far as the effect on the service that we are providing at the present time; and No. 2, if we must seek relief in the form of asking a stay, we need to know what impact it's going to have. This is the only reason for making this request in this form

553 at this time, perhaps to defer it until Tuesday of next week, if the order is issued tomorrow.

The Court: All right; all right, this thing has been going along long enough to where I certainly don't want to make it any more difficult for you because of any ambiguity on my part or any lack of specificity and I think it has been going on long enough to where a delay of three or four or five days is just a drop in the bucket. It doesn't make that much difference. It's minimal, I mean, compared with the time that you have been violating the law. I'll let you go on and stay in violation for a few more days. I don't consider the request unreasonable.

Mr. Devaney: Thank you.

The Court: All right, we'll take an adjournment until further ordered.

(And thereupon the Court was adjourned at 1:12 o'clock p.m., on Wednesday, December 2, 1964.)

554

#### CERTIFICATE OF REPORTER

I HEREBY CERTIFY that the foregoing is a true and complete transcript of the proceedings detailed therein, reported by me personally and transcribed under my supervision.

JOSEPH A. SHERIDAN  
Joseph A. Sheridan,  
*Official Reporter.*

[fol. 903]

MINUTE ENTRY OF ARGUMENT  
AND SUBMISSION—May 21, 1965

(omitted in printing)

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[fol. 904]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT  
No. 22134

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FLORIDA EAST COAST RAILWAY COMPANY,  
Appellant-Appellee,

versus

UNITED STATES OF AMERICA, Appellee-Appellant,  
(AND REVERSE TITLE)

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APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA

OPINION—July 21, 1965

Before TUTTLE, Chief Judge, EDGERTON,\* and SMITH,\*\*  
Circuit Judges.

TUTTLE, Chief Judge: This is another chapter in the long dispute between the Florida East Coast Railway Company and its employees. It comes to us by an appeal by the [fol. 905] Railway from a preliminary injunction entered by the district court. That injunction, entered after the decision by this Court in *Florida East Coast Railway Company v. Brotherhood of Railway Trainmen*, 5th Cir., 336

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\* Senior Circuit Judge of the D. C. Circuit, sitting by designation.

\*\* Of the Third Circuit, sitting by designation.

F.2d 172, purports to put into effect what we there said would be permissible deviations from the collective bargaining agreements during the continuance of a strike. The dispute which brought about the suit in the earlier case and which caused the United States to file the suit in the instant case, is one and the same except that the 11 non-operating unions whose members will be the beneficiaries under the present suit were the employees who went on strike on January 23, 1963, whereas the Brotherhood of Railway Trainmen, the plaintiff in the earlier case, was not on strike but its members observed the picket lines and thus were in substantially the same position and desirous of similar relief.

On the record there before us we made a number of holdings which, unless changed in this case, are in effect the law of the case. These holdings were included in the last full paragraph of the opinion, 336 F.2d 172, 182, which we here quote:

" . . . The FEC is free to operate under the 1949 collective bargaining agreement amended by the November 2, 1959, notice, but FEC may not institute changes in rates of pay, rules and working conditions encompassed by the July 31, 1963, and September 25, 1963, notices until the statutory procedures are exhausted. To do so would be to frustrate the statutory mechanism [fol. 906] for orderly settlement of major disputes. This portion of the District Court's holding is clearly correct. It is, however, free to institute and maintain such employment practices, etc. as are, and continue to be reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions. We do not express any opinion as to the outcome of the District Judge's examination of proposed changes under the select, item-by-item approach that we articulate. However, since he has enjoined the FEC from operating under any terms except those embodied in the pre-November 2, 1959, agreement, we think the most

rational approach is to continue our stay of March 17, 1964, until the District Court has an opportunity to consider the nature and scope of the orders to be entered consistent with this opinion. As soon as the District Judge takes hold of the case, our stay will automatically expire."

When the motion for preliminary injunction in the present case came on before the district court, the district judge delayed handing down his decision because of the pendency of the appeal in the earlier case. After this Court's decision was handed down on August 29, 1964, Judge Simpson entered injunctions in both cases. On October 30, 1964, the trial court restrained the FEC from continuing in effect or implementing in any respect the changes in rates of pay, rules, or working conditions announced in the §6 notices of September 24, 1963 and July 31, 1963, from implementing or continuing in effect the "conditions of employment" of September 1, 1963 and from

"making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike."

On November 12, the FEC filed in the trial court an application for the approval of certain employment practices which it contended were "reasonably necessary" to enable it to continue to operate during the strike. The court granted a stay of its earlier order insofar as it required the FEC to adhere to its agreements with respect to the requested applications pending a hearing on the application for approval of the specific employment practices.

The employment practices departing from the existing collective bargaining agreements which FEC sought permission to put into effect were as follows:

(1) The use of existing personnel to do work across craft lines and seniority districts;

(2) The use of supervisors to perform craft work in the absence of sufficient qualified personnel;

[fol. 908] (3) The exceeding of apprentice and/or trainee ratios or maximum age limitations contained in existing agreements;

(4) The use of non-exempt foremen to perform scope work in the absence of sufficient qualified personnel;

(5) The contracting out of work which FEC did not have personnel available to perform itself;

(6) The performance of the work of bridge tender by supervisory or contract employees;

(7) The furnishing of seniority rosters to labor organizations only if a protective order issued from the court making misuse of the information contained therein punishable as a contempt of court; and

(8) The treating of union shop agreements as void and unenforceable as to replacement workers and returnees until the labor organizations demonstrated their intention to make membership therein available to new employees without discrimination, after which the new employees should have thirty days in which to apply for membership.

Following the hearing on the merits of these several applications, the trial court, in an order entered on December 3, 1964, denied Numbers 1, 4, 7 and 8 but granted Number 3; denied Number 2 except for several positions for a limited time; denied Number 5 except that FEC was per-

[fol. 909] mitted to continue to contract out that work which was presently being contracted out; and denied Number 6 except that FEC was permitted to use contract or supervisory employees as bridge tenders for a restricted period (later extended by supplementary order).

The Railway filed its notice of appeal from the order dated October 30 and the order dated December 3, denying approval of departures from the existing contracts in the respects requested. The United States filed a cross-appeal from both injunctive orders.

A threshold question is raised by a motion by the Railway to dismiss the appeal of the United States on the grounds that the United States has no standing to litigate this case and, as an appellant, it is not a party aggrieved by the decision of the lower court. This motion to dismiss was supported by memoranda but this court, by order dated March 12, 1965, directed that the motion be carried with the case to be heard and considered at the time of the hearing of the case on the merits.

We dispose first of the contention that the United States has no standing in the litigation. The contention of the Railway is that since there is here no actual "interruption to interstate commerce" the United States has no right under the Commerce Clause of the United States Constitution to maintain the suit. This distinguishes the case, the Railway says, from *Re Debs*, 158 U.S. 564, in which it was held by the Supreme Court that a strike then in existence against the railroad gave the United States standing to seek an injunction to prevent a substantial part of commerce from coming to an actual stop. The Railway further [fol. 910] contends that the United States has no inherent power to litigate for the purpose of "protecting the jurisdiction" of the National Mediation Board, which jurisdiction is said to be endangered by FEC's alleged violations of the Railway Labor Act. The standing of the United States as an appellant here is further contested by the Railway on the theory that it was not an aggrieved party as a result of the decision of the court below.

The United States contends that its right to file the original action is threefold. It says (1) It has a right of action based upon the Commerce Clause of the Constitution to enjoin conduct which obstructs interstate commerce, under the *Debs* case; (2) it has a right of action to enforce the provisions of the Railway Labor Act, and (3) it has standing to sue in order to protect the jurisdiction of the National Mediation Board, and to aid that agency in the carrying out of its statutory functions. We think we need go no further than to hold, as we do, that the allegations of the complaint touching on the threat of obstructing interstate commerce is sufficient to bring the case within the ambit of the court's decision in *Re Debs, supra*. See also *United States v. City of Jackson, Mississippi*, 5th Cir. 318 F.2d 1. Not only the allegations, but the proof adduced on the hearing for preliminary injunction, establish at least preliminarily that the actions of FEC, which we have, by our earlier decision, found to violate the Railway Labor Act, are a substantial threat to the free flow of interstate commerce. Moreover, as called to our attention by the United States, the Act itself in 45 U.S.C.A. 152 Tenth seems to authorize this type of [fol. 911] proceeding by the United States. This provision is as follows:

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, . . . It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof . . ."

Finding, as we do, that the United States had standing to bring the action, it follows necessarily that, having not



completely prevailed in the trial court in seeking to prevent all modifications of the existing employment contracts, the United States may be considered as an aggrieved party for the purpose of filing its cross-appeal.

On the merits of the appeal both the Railway and the Government reargue much of what has already been decided by this Court in the *BRT* case, *supra*, and both formally in their briefs request a modification of the Court's decision in that case. The United States particularly while stating that the solution there was probably as equitable a one as could be devised, if any deviations at all could be recognized on account of strike conditions, nevertheless [fol.912] contended that under the statute no deviations were permissible. As we stated in the *BRT* case, 336 F.2d at 181, "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike. On management, the right to operate, or at least the right to try to operate." We then stated, "But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." We concluded that the manner in which this impasse could be resolved was to permit the Railway "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F.2d at 182.

We are not disposed to modify the law of the case now that the trial court has undertaken to carry out the mandate in the *BRT* case. We shall undertake to determine whether, in the case before us, the court has adequately understood and given effect to our earlier decision.

The Railway makes a major attack on the procedural steps which the trial court imposed on it, that is, forbidding it to deviate in the slightest degree from the exist-

ing employment contract "except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court . . . ." The Railway contended that it should be permitted to institute the deviations and leave it to the United States [fol. 913] or the Brotherhoods to complain to the trial court and carry the burden of proving the deviation not to be "reasonably necessary" in the strike conditions.

We think that the prior decision of this Court was so worded as to permit the trial court to adopt the procedure which it followed in entering the injunction of October 30. We think it entirely appropriate that since a departure from the employment contracts is, as clearly stated by us in our prior opinion, the exception even during the strike it is appropriate for the burden of showing the necessity for such departure to be placed on the party claiming the privilege.

Coming finally to the specific departures permitted and forbidden by the trial court to the Railway, we note that in our earlier opinion we made the following comment: "While this appears to move the Judge from the firing line, *Townsend v. Sain*, 1963, 372 U.S. 293, 319, 83 Sup. Ct. 745, 9 L.Ed.2d 770, into the locomotive cab, it is not for him to decide what to pay, etc. His task is to pass on what FEC had done or proposes to do." We think it even less appropriate for this Court itself to attempt to take the engineer's place in a locomotive cab. We know full well that the distinguished trial Judge has had a long familiarity with the Florida East Coast Railroad and its operations, and more particularly in recent years he has had much experience with its labor problems. We think that his findings and determinations with respect to the departures from the employment contract reasonably necessary under strike conditions are as much entitled to be undisturbed except upon a finding that they are clearly erroneous as [fol. 914] are other findings of fact by a trial court sitting without a jury. We find none of his determinations in this

respect to be without a substantial basis on the record as a whole to support them. We therefore decline to interfere either with these findings or with the normal discretionary power of the trial court in the granting of interlocutory orders in such a case as this.

On the appeal by the Florida East Coast Railroad Company, the judgment is **AFFIRMED**. On the cross-appeal of the United States, the judgment is **AFFIRMED**.

[fol. 916]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 22134

D. C. Docket No. 64-107-Civ-J

FLORIDA EAST COAST RAILWAY COMPANY,  
Appellant-Appellee,

versus

UNITED STATES OF AMERICA, Appellee-Appellant,  
(AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA

Before TUTTLE, Chief Judge, EDGERTON,\* and SMITH,\*\*  
Circuit Judges.

JUDGMENT—July 21, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

\* Senior Circuit Judge of the D. C. Circuit, sitting by designation.

\*\* Of the Third Circuit, sitting by designation.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court on the appeal by the Florida East Coast Railway Company and on the cross-appeal of the United States, in this cause be, and the same is hereby, affirmed.

Issued as Mandate: Aug 12 1965

[fol. 917] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 918]

SUPREME COURT OF THE UNITED STATES

No. ....—October Term, 1965

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UNITED STATES, Petitioner,

v.

FLORIDA EAST COAST RAILWAY Co.

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI—October 15, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 18, 1965.

Hugo L. Black, Associate Justice of the Supreme  
Court of the United States.

Dated this 15th day of October, 1965.

[fol. 919]

## SUPREME COURT OF THE UNITED STATES

No. ....—October Term, 1965

UNITED STATES,

v.

FLORIDA EAST COAST RAILWAY CO., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI—November 18, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including Nov. 29, 1965.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 18th day of November, 1965.

[fol. 920]

## SUPREME COURT OF THE UNITED STATES

No. 750—October Term, 1965

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, et al., Petitioners,

v.

FLORIDA EAST COAST RAILWAY COMPANY.

## ORDER ALLOWING CERTIORARI—January 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

This case is consolidated with Nos. 782 and 783 and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in No. 782.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

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[fol. 921]

SUPREME COURT OF THE UNITED STATES

No. 782—October Term, 1965

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UNITED STATES, Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY, et al.

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ORDER ALLOWING CERTIORARI—January 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 750 and 783 and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.

[fol. 922]

## SUPREME COURT OF THE UNITED STATES

No. 783—October Term, 1965

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FLORIDA EAST COAST RAILWAY COMPANY, Petitioner,

v.

UNITED STATES.

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## ORDER ALLOWING CERTIORARI—January 24, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 750 and 782 and a total of two hours is allotted for oral argument. The United States is to open the argument and direct itself first to issues raised in No. 782.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Fortas took no part in the consideration or decision of this petition.





EXHIBIT VOLUME

TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

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BROTHERHOOD OF RAILWAY AND STEAMSHIP  
CLERKS, FREIGHT HANDLERS, EXPRESS AND  
STATION EMPLOYEES, AFL-CIO, ET AL., PETI-  
TIONERS,

vs.

FLORIDA EAST COAST RAILWAY COMPANY.

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No. 782

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UNITED STATES, PETITIONER,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,  
ET AL.

---

No. 783

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FLORIDA EAST COAST RAILWAY COMPANY,  
PETITIONER,

vs.

UNITED STATES.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 750 PETITION FOR CERTIORARI FILED NOVEMBER 15, 1965

NO. 782 PETITION FOR CERTIORARI FILED NOVEMBER 29, 1965

NO. 783 PETITION FOR CERTIORARI FILED NOVEMBER 29, 1965

CERTIORARI GRANTED JANUARY 24, 1966



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